

No. 12394

United States
Court of Appeals
for the Ninth Circuit.

MYRTLE CANON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 6 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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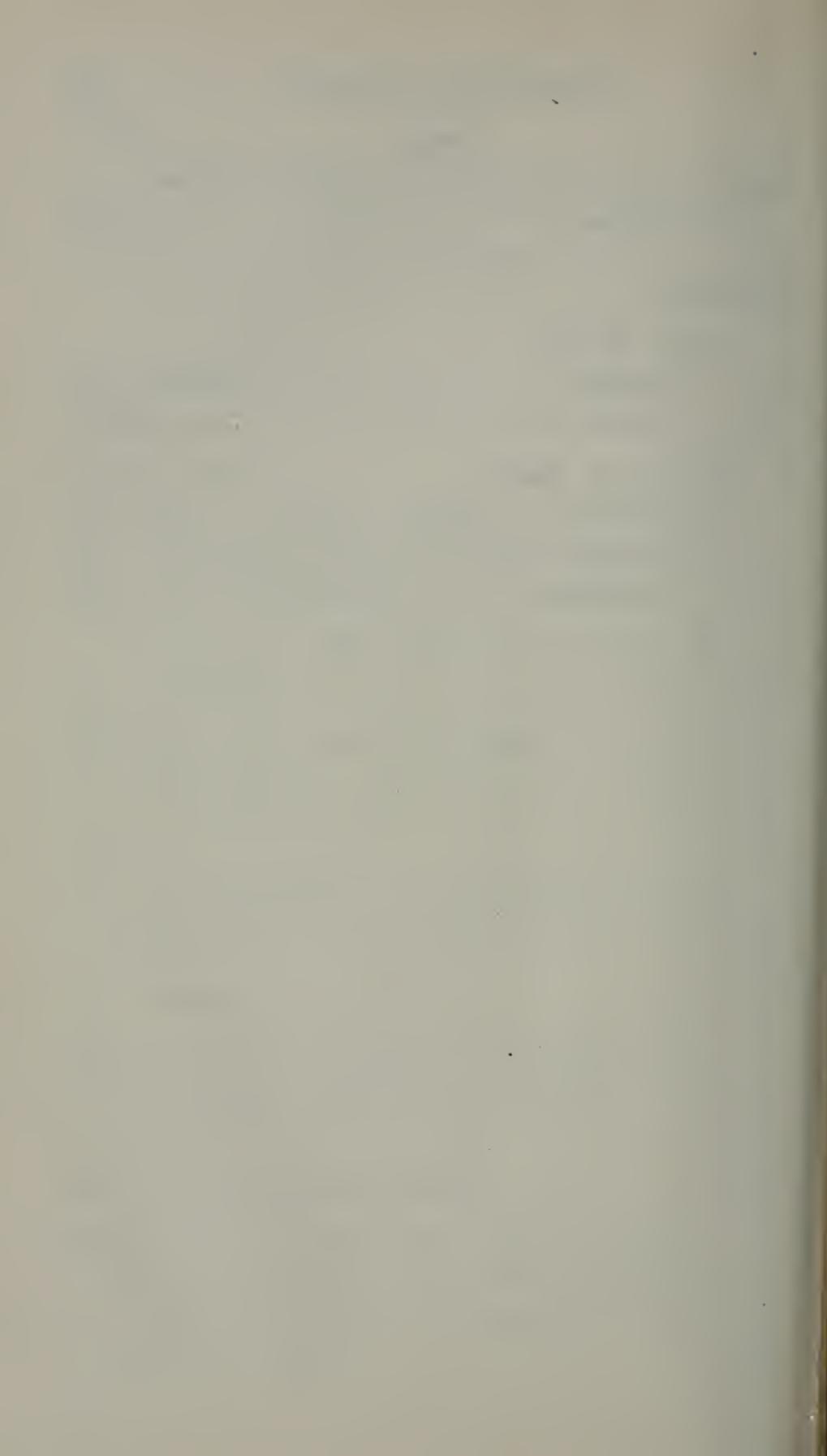
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NAMES AND ADDRESSES OF ATTORNEYS

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ZAMLOCK & WERTHEIMER,

345 Franklin Street,
San Francisco, California.

Attorneys for Plaintiff and Appellant.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,

Post Office Building,
San Francisco, California.

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 27473-G

MYRTLE CANON,

Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, THIRD DOE, FOURTH
DOE, FIFTH DOE and SIXTH DOE,
Defendants.

COMPLAINT

Plaintiff, Myrtle Canon, complains of defendants
above named, and for cause of action alleges:

I.

Plaintiff is uninformed of the true names of the
defendants sued herein as First Doe, Second Doe,
Third Doe, Fourth Doe, Fifth Doe and Sixth Doe;
said names are fictitious, and plaintiff prays that
when the true names of these defendants shall be
ascertained they may be inserted herein in lieu
thereof together with appropriate charging allega-
tions.

II.

On June 14, 1945, and for a long time prior
thereto, plaintiff was employed at the DeWitt Gen-
eral Hospital located at Auburn, California, by the

War Department of the United States of America, as executive Secretary of the Vascular Surgical Section of said hospital; said hospital was owned, operated and managed by the said War Department.

III.

On the aforesaid day plaintiff was operated upon for varicose veins by employees and agents of said War Department at said hospital; at all times said employees and agents were acting within the course and scope of their employment, agency and authority.

IV.

Said operation was so negligently performed, and the wound of said operation was so negligently treated by said employees, acting as aforesaid, that as a proximate result of said negligence the wound caused by the operation became badly infected, and a phagadenic ulcer developed.

V.

Plaintiff continued to be treated by said employees and agents acting as aforesaid at the said DeWitt Hospital until on or about November 24, 1945. At said time said infection and ulcer were active and not cured, but nevertheless, said employees, acting as aforesaid, negligently and carelessly caused plaintiff to be removed from and discharged from said hospital. Said infection and ulcer have not been cured, and plaintiff is informed

and believes, and therefore alleges, that said infection and ulcer will never be cured.

VI.

As a proximate result of the aforesaid negligence, plaintiff has suffered, and will continue to suffer, excruciating pain and agony. As a further proximate result of the aforesaid negligence, numerous operations, blood transfusions and skin grafts have been necessary, and plaintiff has required, and will continue to require, hospitalization, medical, surgical and nursing attention, blood transfusions and skin grafts for an indeterminable time in the future; plaintiff has been disfigured permanently as a result of the operations and skin grafts necessitated as a proximate result of the negligence of said defendants, acting as aforesaid; plaintiff has been and will continue to be completely bedridden and disabled and unable to perform any kind of work for an indeterminable time in the future.

VII.

As a proximate result of the negligence and carelessness of the defendants, as aforesaid, plaintiff has incurred, and will incur, an indebtedness for hospitalization and nursing services and for doctor bills; that the true and exact amount of said hospital and nursing and doctor bills are presently unknown to plaintiff, and in this respect plaintiff prays to amend this complaint to include such amounts when the same become known to her.

VIII.

As a further direct and proximate result of the foregoing, plaintiff was caused to and did suffer, and will continue to suffer, loss of salary and wages as the result of loss of time from her regular employment by reason of the negligence and carelessness of the defendants, and each of them, as aforesaid; that the amount of such loss of salary and wages cannot be ascertained at this time and plaintiff prays leave to amend the within complaint by alleging the true amount thereof when the same become known to her.

IX.

As a proximate result of the negligence and carelessness of the defendants, plaintiff has been generally damaged in the sum of One Hundred Thousand Dollars (\$100,000.00), no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendants in the sum of One Hundred Thousand Dollars (\$100,000.00), for such items of special detriment as she may prove, for her costs of suit, and for such other relief as may be proper.

/s/ VINCENT HALLINAN,
/s/ JAMES MacINNIS,
/s/ ARCHER ZAMLOCH,
/s/ RALPH WERTHEIMER,
Attorneys for Plaintiff.

[Endorsed]: Filed July 31, 1947.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant United States of America, and answering plaintiffs Complaint herein, denies and alleges as follows:

I.

Denies the allegations of Paragraphs IV, VI, VII, VIII and IX of said Complaint, and denies the portion of Paragraph III, beginning with the words "at all times," Line 6, Page 2, to and including the word "authority," Line 8, Page 2, and the allegations of the portion of Paragraph V, beginning with the word "Plaintiff," Line 16, Page 2, to and including the word "hospital," Line 21, Page 2.

II.

Said defendant is without information upon the subject sufficient to enable it to form a belief as to the truth of the allegations contained in the portion of Paragraph V, beginning with the words "Said infection," Lines 21-22, Page 2, to and including the word "cured," Line 24, Page 2, and, therefore, and basing its denial upon said ground, said defendant denies said allegations.

III.

Denies that plaintiff has been damaged in the sum of \$100,000.00, or any part thereof, or in any sum or amount, or at all.

Wherefore, said defendant prays that plaintiff

take nothing by her Complaint herein, and that said defendant be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney.

Attorneys for Defendant
United States of America.

[Endorsed]: Filed February 16, 1948.

District Court of the United States, Northern
District of California, Southern Division

At A Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Friday, the 8th day of April, in the year of our
Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 27473-G Civil

MYRTLE CANON,
vs.

UNITED STATES OF AMERICA, et al.

FURTHER TRIAL—ORDER GRANTING DE-
FENDANT'S MOTION FOR JUDGMENT
OF DISMISSAL

This case came on regularly this day for further trial. Ralph Wertheimer, Esq. was present on behalf of the plaintiff, and Daniel Deasy, Esq., Assistant U. S. Attorney, was present on behalf of the United States. The motion of the defendant for a judgment of dismissal having been submitted to the Court for consideration and decision and the same having been fully considered, it is Ordered that said motion be granted in accordance with an oral decision this day rendered.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

This suit is one under the Tort Claims Act, 28 USS Sec. 921 et seq. (1948 Revision, 28 USCA 2671 et seq.)

The Court has had under advisement the motion of the United States for dismissal made at the conclusion of the plaintiff's case.

The facts are that plaintiff was a civilian medical secretary or clerk employed in the DeWitt General Hospital at Auburn, California, operated by the Medical Department of the War Department. On June 14, 1945, while she was such employee, Colonel William Smith, commanding officer of the hospital, arranged for her to be operated upon in the Army Hospital for varicose veins in her legs, a disease or ailment with which she had been afflicted for sometime, and which was in no way caused or contributed to by her employment. The operation was performed by Dr. E. Wm. Rector and she received post-operative treatment from both Dr. Rector and Dr. Norman Freeman, chief of the vascular section of the Hospital.

Plaintiff contends that the operation was negligently performed and resulted in infection of the wound, and that such negligence, contributed to by negligence in the treatment of the wound thereafter, caused the infection to develop into a phagadenic

ulcer, a rare and unusual disease. There is no doubt that the infection and resulting phagadenic ulcer have not been healed and that plaintiff has undergone great suffering due to a series of operations and that she has been disfigured, and that her condition, in all probability, is permanent. She seeks damages against the United States in the sum of \$100,000. The evidence, without a doubt, discloses that the damage is great, and, if the liability of the United States is established, an award of the amount prayed for would not be excessive.

The main question presented by the motion to dismiss is whether, assuming negligence of the attending physicians, the United States is liable.

By Section 1346 of 28 USC, Federal Tort Claims Act, the United States waives its sovereign immunity to suits for damages for personal injuries "caused by the negligence or wrongful act or omission by any employee of the government while acting in the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant for such damages and * * * in accordance with the law of the place where the act or omission occurred."

By Section 2671, members of the military and naval forces of the United States are declared to be within the term "employee of the government," and in the case of the members of the military and naval forces, the term "acting within the scope of his office or employment" is declared to mean "acting in line of duty."

In waiving its sovereign immunity and consenting to be sued, the United States fixed and bounded the area of its liability. And its liability, as so fixed, cannot, under any equitable or quasi-equitable theory, be extended beyond the stated limits. By this statute, the United States consents to be sued (1) in cases of negligence of employees "while acting in the scope of employment or office" and then only (2) if besides, the circumstances are such that a private person would be liable under the law of the place where the act or omission of the employee occurred. (*Cerri v. U. S.* 80 Fed. Supp. 931.) *U. S. v. Campbell*, 5 Cir. 172 Fed. 2d 500.

The first question to be considered is therefore, what was the "scope of authority" or "line of duty" of the Commanding Officer and the physicians who attended Miss Cannon.

Army Regulation #40-590 promulgated by the War Department August 29, 1944, and in force at the time of the occurrence of the acts alleged in the complaint, prescribed and classified the persons who are entitled to receive treatment and hospitalization in Army Hospitals.

Miss Cannon was not within any classification of persons who were entitled to receive treatment and hospitalization in Army Hospitals. In particular, she was not within any class of civilian employees entitled to receive such treatment in Army Hospitals. Those performing the duties performed by her, were not, by the regulations, admissible to the hospital for treatment or operation or medical at-

tention. All that the evidence showed in this case, according to the testimony of the plaintiff, is that Colonel Smith, upon plaintiff's request that she be given a leave of absence so that she could go to a civilian hospital to have her varicose veins treated, urged and prevailed upon her to remain at the DeWitt Hospital and be operated upon there, so that she would be more readily available for duty after the operation. Plaintiff testified that her services were badly needed in the Hospital and that it was for that reason that Colonel Smith urged her to have the operation there and so arranged for it. That Colonel Smith had no authority under the regulations to tender and perform the medical services, furnished and given to the plaintiff, and also that he had no authority to offer the services of the Hospital to Miss Cannon, is not and was not subject to dispute.

There is no question but that the Government of the United States acts only through its agents with power delegated and defined by statute or regulation, which all who deal with such persons are presumed to know. *The United States can be bound only by agents acting within the scope of the authority delegated to them.* *Hawkins v. U. S.* 96 U. S. 689; *Wilbur Nat. Bank v. United States*, 294 U. S. 120; *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380; *Utah Power & Light Co. v. United States*, 243 U. S. 389; *Roth v. Hood*, 6 Cir. 106 Fed. 2d 616; *Farm Security Admin. v. Herren*, 8 Cir. 165 Fed. 2d 554.

Certainly a private hospital corporation would not be liable, if an interne or resident doctor employed to treat patients regularly admitted to the hospital caused or induced a third party to be operated upon and receive hospitalization without cost or expense to such person, and then negligently treated such person. For in such a case, such acts would not be within the scope of employment under the laws of California. So here the United States cannot be held responsible for the act of a doctor in an Army Hospital who, without any authority and acting clearly beyond the scope of his authority in line of duty, caused to be extended to a person not entitled thereto, services of doctors who were employees of the United States and the services and facilities of a hospital owned and operated by the United States.

It is contended by the plaintiff that the Commanding Officer of the Hospital, in admitting plaintiff to the Hospital and causing medical and hospital services to be extended to her, in fact acted within the scope of his employment because he admitted her to the Hospital as a civilian entitled to treatment, even though he acted erroneously. Having admitted her, counsel says, upon such mistake in fact, the United States nevertheless became bound. However, as previously pointed out, the authority of employees of the United States is defined by statute or rule and all persons dealing with such employees do so at their peril as to the extent of the authority of such employees. See *Hawkins v. U. S.* and other cases cited supra.

It is also contended by the plaintiff that even though her admission to the Hospital was an act beyond the scope and authority of the Commanding Officer, there is still responsibility on the part of the United States because of the fact that plaintiff was a licensee, if not an invitee, on the hospital premises. California case citations urged in support of this contention, however, are not in point for they all involve negligent acts of persons acting within the scope of their employment, or involve physical conditions resulting from negligence of agents acting within the scope of their authority. Licensees as well as invitees are not protected against negligent acts of employees acting beyond the scope of their authority or employment.

Some point is also made that the services extended to plaintiff were in a sense for the benefit of the government because of the need of her services at a time of difficulty in obtaining trained medical secretaries and hence there is a consequent responsibility of the United States for the injuries suffered by the plaintiff. However, there is no known doctrine by which responsibility or liability is imposed upon the United States because of any benefit to it, nor does responsibility ensue as a result of estoppel, or like equitable theory.

Since the Officers and employees of the United States here clearly and admittedly acted beyond the scope of their authority, there can be no liability under the Federal Tort Claims Act. While I base decision upon that ground, there is also no doubt

in my mind that the evidence adduced is of such a nature that I would be compelled to make a finding, if the issue were reached, that plaintiff's injury and damage was not the result of or caused by any negligence or mal-practice on the part of the operating or attending physicians.

Motion for judgment of dismissal will be granted. Present findings pursuant to the Rules.

Dated: April 8, 1949.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-named Court on the 22nd day of March, 1949, at the hour of 10:00 o'clock a.m., Honorable Louis E. Goodman, United States District Judge, presiding.

The plaintiff, Myrtle Canon, was represented by Ralph Wertheimer, Esq., appearing for Messrs. Vincent Hallinan, James MacInnis, Archer Zamloch and Ralph Wertheimer, attorneys for plaintiff herein, and the defendant United States of America was represented by Frank J. Hennessy, Esq., United States Attorney, appearing by Daniel C. Deasy, Esq., Assistant United States Attorney.

Thereupon the Court ordered the trial to proceed,

and oral and documentary evidence was introduced, and the plaintiff having completed the presentation of her evidence and having rested, the defendant United States of America thereupon made a motion for a judgment of dismissal, and said motion having been argued to the Court by counsel and having been submitted, and the Court having considered the law and the evidence, and being fully advised of the law and the facts and the premises, and having made its order granting defendant's motion for a judgment of dismissal herein, the Court finds and makes the following

Findings of Fact

I.

That the Court has jurisdiction to hear and determine said action by reason of the provisions of the Federal Tort Claims Act, Title 28 United States Code, §§921 to 946 (Public Law 601—79th Congress, 2nd Session, Chapter 753, Part IV);

II.

That plaintiff on and before June 14, 1945, was a civilian medical secretary employed by the United States at the DeWitt General Hospital at Auburn, California, a hospital operated by the Medical Department of the War Department of the United States;

III.

On June 14, 1945, plaintiff was operated upon in said hospital for varicose veins in her legs, a disease

or ailment with which she had been afflicted for some time and which was in no way caused or contributed to by her employment. The operation was performed by Dr. E. William Rector, with the permission of Colonel William Smith, Commanding Officer of said hospital. Plaintiff received post-operative treatment from both Doctor E. William Rector and Dr. Norman Freeman, Chief of the vascular section of said hospital.

IV.

Subsequent to said operation an infection appeared at the site of the operative wound. A course of treatment consisting of medication, irrigation of the infected area, and a series of operations, was instituted by the attending doctors in an attempt to arrest and cure the infection. In spite of such course of treatment the infection continued to spread and developed into a phagedenic ulcer, a rare and unusual disease. This ulcer continued to spread over the plaintiff's body during the entire time she remained under treatment at DeWitt General Hospital, and thereafter while she was successively a patient at the University of California Hospital in San Francisco, California, the San Francisco City and County Hospital, and two hospitals in Los Angeles, California. At the time of trial herein, the said ulcer was not yet completely healed.

V.

On June 14, 1945, and at all times subsequent thereto while plaintiff remained in the DeWitt Gen-

eral Hospital, the said hospital was operated by the Medical Department of the War Department of the United States under army regulations promulgated by the Secretary of War through the Chief of Staff, United States Army, including Army Regulations No. 40-590.

VI.

Army Regulations No. 40-590, entitled "Medical Department Administration of Hospitals, General Provisions," promulgated August 29, 1944, and in effect on June 14, 1945, designated and enumerated the classes of persons including both civilian and service personnel who might be admitted to Army hospitals and be provided with hospitalization and medical treatment therein. Plaintiff was not a person whose status, duties or employment brought her within any of the classes of persons entitled under said Army Regulation to be admitted to or operated upon or treated in the DeWitt General Hospital.

VII.

Colonel William Smith, Commanding Officer of DeWitt General Hospital, on June 14, 1945, was not empowered under Army Regulations 40-590 or otherwise, to admit plaintiff to DeWitt General Hospital as a patient nor to authorize an operation for varicose veins to be performed upon her in said hospital, nor to authorize or consent to the use of the facilities of said hospital for such operation or for post-operative treatment of plaintiff, nor was he empowered to order or direct any of the doctors,

nurses or other persons employed by the United States in said hospital or assigned to said hospital for duty as officers or enlisted personnel of the United States Army, to perform any operation upon plaintiff or to render her any surgical, medical nursing or other care, attention or treatment in connection with or for the relief or treatment of the varicose veins with which she was afflicted on June 14, 1945.

VIII.

Dr. E. William Rector was not empowered under Army Regulations 40-590, or otherwise, to perform an operation upon plaintiff for varicose veins on June 14, 1945, nor to provide her with post-operative surgical or medical care or treatment at DeWitt General Hospital.

IX.

Dr. Norman Freeman was not empowered, under Army Regulations 40-590, or otherwise, to provide plaintiff with surgical or medical care or treatment at DeWitt General Hospital.

X.

None of the nurses, doctors, attendants or other employees of the United States employed in, or attached or assigned to DeWitt General Hospital during the time plaintiff was a patient in said hospital, either as civilian employees of the United States or as officers or enlisted personnel of the United States Army, was authorized under Army

Regulations 40-590, or otherwise, to provide plaintiff with medical, surgical, hospital, nursing or any other care, treatment, services or attention in DeWitt General Hospital.

XI.

Colonel William Smith, Commanding Officer of DeWitt General Hospital had no authority under Army Regulations 40-590 or otherwise, to determine or make any finding that plaintiff was a person within any of the classes enumerated in said regulations as being entitled to admission to said hospital as a patient.

XII.

In admitting plaintiff to said hospital as a patient, Colonel William Smith was not acting in line of duty; in authorizing Dr. Rector to operate upon her, he was not acting in line of duty; in consenting to her post-operative treatment, he was not acting in line of duty.

XIII.

In operating upon plaintiff on June 14, 1945, Dr. E. William Rector was not acting in line of duty; in treating her surgically and medically subsequent to said operation, he was not acting in line of duty.

XIV.

In treating plaintiff surgically and medically subsequent to the operation performed upon her by Dr. E. William Rector, Dr. Norman Freeman was not acting in line of duty.

XV.

In providing hospital, nursing and other care, treatment, services and attention to plaintiff, none of the doctors, nurses or other civilian or military personnel employed at, attached to, or assigned to duty in the DeWitt General Hospital, was acting in line of duty.

XVI.

The allegations of paragraph II of plaintiff's complaint are true.

XVII.

It is true that plaintiff was operated upon for varicose veins by employees of the United States at DeWitt General Hospital.

XVIII.

No finding is made as to the allegations of paragraph IV of plaintiff's complaint, except that the wound became infected and a phagedenic ulcer developed.

XIX.

No finding is made as to the allegations of paragraph V of plaintiff's complaint, except that plaintiff continued to be treated at the DeWitt General Hospital until about November 24, 1945, at which time she was discharged from said hospital by reason of the fact that it was being deactivated by the Medical Department of the United States Army, and except that at the time plaintiff left DeWitt General Hospital, the phagedenic ulcer was not

cured and that at the time of trial of this action it was not cured.

XX.

No finding is made as to the allegations of paragraph VI of plaintiff's complaint, except that plaintiff has suffered and is now suffering great pain, that numerous operations were performed upon plaintiff subsequent to the development of said phagedenic ulcer, that she was given numerous blood transfusions and skin grafts, that she still requires medical attention and will require such attention in the future, and that plaintiff has been disfigured as a result of such ulcer, operations and skin grafts.

XXI.

No finding is made as to the allegations of paragraph VII of plaintiff's complaint, except that plaintiff has incurred indebtedness for hospitalization, nursing services and doctor bills.

XXII.

None of the allegations of paragraph VIII of plaintiff's complaint are true.

XXIII.

None of the allegations of paragraph IX of plaintiff's complaint are true.

XXIV.

By reason of the findings of fact heretofore made, to the effect that the Government employees involved herein were not acting at any time within

the scope of their employment in connection with the admission of plaintiff as a patient to DeWitt General Hospital, the operation upon her for varicose veins and post-operative treatment and hospitalization afforded her, the Court deems it unnecessary to make any findings as to whether or not any of the said employees of the United States were negligent or careless or guilty of malpractice, or any careless or wrongful act or omission in the said operation, hospitalization or treatment afforded to said plaintiff.

Conclusions of Law

From the foregoing facts this Court finds that:

I.

None of the persons who operated upon plaintiff or who provided her with hospitalization, surgical services, medical treatment, nursing care or other services, treatment, care or attention in DeWitt General Hospital on June 14, 1945, or at any time subsequent thereto, were acting within the scope of their employment by the United States, or in the line of duty.

II.

Plaintiff is not entitled to recover any damages against the United States of America herein.

III.

Defendant United States of America is entitled to judgment of dismissal upon its motion to dismiss said action.

IV.

Defendant United States of America is entitled to recover from plaintiff its costs of suit herein.

Let judgment be entered accordingly.

Done in open Court this 21st day of June, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Lodged June 13, 1949.

[Endorsed]: Filed June 21, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 30th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

ORDER FOR ENTRY OF JUDGMENT

Ordered judgment entered in the form this day signed.

[Title of District Court and Cause.]

JUDGMENT

This cause came on regularly for trial before the United States District Court for the Northern District of California, Southern Division, Honorable Louis E. Goodman, United States District Judge, presiding, Messrs. Vincent Hallinan, James MacInnis, Archer Zamloch and Ralph Wertheimer, by Ralph Wertheimer, appearing for the plaintiff, Myrtle Canon, and Frank J. Hennessy, United States Attorney, by Daniel C. Deasy, Assistant United States Attorney, appearing for the defendant, United States of America; whereupon said cause proceeded to trial, and oral and documentary evidence having been introduced and the plaintiff having rested her case, the defendant United States made its motion for a judgment of dismissal, and said motion having been argued by counsel and having been submitted, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment of dismissal be entered in accordance with the findings of fact and conclusions of law;

Now, Therefore, by reason of the law and findings as aforesaid, It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby, dismissed and that the defendant United States of America have judgment against plaintiff

Myrtle Canon for its costs of suit herein taxed at \$.....

Done in Open Court this 30th day of August, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form:

HALLINAN, MacINNIS, ZAM-
LOCH, WERTHEIMER,

/s/ RALPH WERTHEIMER,
Attorneys for Plaintiff
Myrtle Canon.

[Endorsed]: Filed August 30, 1949.

Entered in Civil Docket August 31, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendant, United States of America, and
to Frank J. Hennessy, Esq., its attorney:

Notice is hereby given that Myrtle Canon, plaintiff above named, hereby appeals to the Court of Appeals, Ninth Circuit, from the judgment heretofore entered in this action on the 31st day of August, 1949.

HALLINAN, MacINNIS &
ZAMLOCH,
RALPH WERTHEIMER,
/s/ RALPH WERTHEIMER,
Attorneys for Plaintiff.

[Endorsed]: Filed September 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the United States District Court
for the Northern District of California, South-
ern Division:

Please include in the record on appeal the fol-
lowing:

1. Complaint;
2. Answer;
3. Reporter's Transcript;
4. Minute Order of April 8, 1949;
5. Opinion;
6. Findings of Fact and Conclusions of Law;
7. Judgment;
8. Notice of Appeal;
9. Designation of Record on Appeal.

Dated: November 2, 1949.

HALLINAN, MacINNIS &
ZAMLOCH,

By /s/ RALPH WERTHEIMER,
Attorneys for Plaintiff
and Appellant.

[Endorsed]: Filed November 3, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Defendant-Respondent respectfully supplements the Plaintiff-Appellant's "Designation of Contents of Record on Appeal" filed herein on November 3, 1949, and requests the following documents be forthwith added to and made part of the contents of said record on appeal, to-wit:

Any and all exhibits filed by either plaintiff or defendant in the District Court.

Dated: December 23, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ CHARLES O'GARA,
Assistant U. S. Attorney,
Attorneys for Defendant
U. S. of America.

Affidavit of service by mail attached.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO
RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to-wit:

Complaint.

Answer to Complaint.

Minute Order of April 8, 1949—Order Granting Defendant's Motion for Judgment of Dismissal.

Opinion.

Findings of Fact and Conclusions of Law.

Minute Order of August 30, 1949—Order for Entry of Judgment.

Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 4th day of November, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal]: By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing document and accompanying Exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the supplement to the Record on Appeal herein, as designated by the Appellees, to wit:

Supplemental Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1, 2 (in two parts), 3 (in two parts), 4, 5, 6, 7, 8 and 9.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of January, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal]: By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
REPORTER'S TRANSCRIPT

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the following Reporter's Transcript was filed in the above-entitled case, and is herewith forwarded to the United States Court of Appeals for the Ninth Circuit, to be considered by it as part of the Record on Appeal, herein, to wit:

Reporter's Transcript for March 22, 1949.

Witness my hand and seal of the District Court of the United States for the Northern District of California this 7th day of December, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal]: By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the United States District Court for the Northern District of California, Southern Division

No. 27,473-G

MYRTLE CANON,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

Before: Honorable Louis E. Goodman,
United States District Judge.

Tuesday, March 22, 1949

Appearances:

RALPH WERTHEIMER, ESQ.,
For the Plaintiff.

FRANK J. HENNESSY,
United States Attorney, by

DANIEL DEASY,
Assistant United States Attorney.
For the United States Government.

PROCEEDINGS

(Argument on Motion to Dismiss.)

The Court: I think we might proceed with your evidence.

Mr. Wertheimer: Very well, your Honor.

Now, I am in this position. I have asked Dr. Efnard, who is a doctor for Miss Canon, to come

up *her* from Los Angeles. He will be here tomorrow. At that time I expect to ask him certain questions based upon evidence which I thought would be in at this time. That evidence is contained in the records of the DeWitt Hospital.

I had expected to be able to—hoped to have read it into the record. I think the only thing I could do at this time—I have gone over the record with a great deal of patience—is to offer it in evidence. The record, all of the records pertaining to the treatment given to Miss Canon at the DeWitt General Hospital at Auburn, California, from the time the records commenced which is prior to her operation on June 14, 1945, until her transfer to the University of California Hospital. I would like to offer those in evidence.

The Court: You are offering the records as business records of the hospital?

Mr. Wertheimer: Yes.

The Court: All things that have to do with the treatment that was given to the lady in the hospital, is that right?

Mr. Wertheimer: Yes. [2*]

The Court: I have ruled in some of these cases that that is admissible in evidence under the business record rule but that it does not permit the introduction of any opinions or diagnoses of doctors which might be included in the record, because that would be hearsay without any opportunity of cross-examining the doctor. In other words, I think you are familiar with that.

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Wertheimer: I think that is a correct ruling.

The Court: Yes, I think that is correct.

Mr. Deasy: I have no objection to the admission of the records in so far as they show—as they are records of the day by day procedures of treatment, but where there are—all reports, reports of—

The Court: Chemical, pathological and laboratory reports.

Mr. Deasy: Laboratory reports and things of that kind, but the statements in there of the doctor's notes made in there as to what he thinks about things and his opinions.

The Court: That is just what I have just stated.

Mr. Deasy: I object to those.

The Court: I will admit the records in evidence except any records of the opinions of doctors that might be contained. They would be subject to the hearsay rule.

Mr. Deasy: I think, your Honor, in these particular records there is some correspondence between doctors and [3] various other people, including members of the plaintiff's family, if I recall correctly. I don't know whether those would be admissible under the same theory.

Mr. Wertheimer: I don't think they would be.

The Court: Well, the record is admitted only to the extent that it contains day by day records of what happened to the lady in the hospital and the treatments that were afforded her, bacteriological, X-ray and other reports and excluding anything else that would be the subject of the hearsay rule.

Mr. Wertheimer: I think that is, your Honor, a correct statement or a correct ruling. There may be, I think there may be, and I may be anticipating some conflict between myself and Mr. Deasy as to what falls within the admissible and not—

The Court: In offering the ruling will be subject to a motion to strike as to any particular matter that the Court's attention is called to.

Mr. Deasy: Yes.

Mr. Wertheimer: All right, sir.

Mr. Deasy: Are those three groups hospital records?

The Court: This is just the DeWitt Hospital records.

Mr. Deasy: That is the group that was introduced on a preliminary hearing?

The Court: You are only offering the DeWitt Hospital [4] records?

Mr. Wertheimer: Yes.

The Court: Very well. Mark it then.

The Clerk: Are those mixed up in this group (indicating)?

The Court: You had better point out to the Clerk which is the record so that he will know what to mark.

Mr. Wertheimer: I think I will have to—the difficulty there, your Honor, is in the form in which they came, they are a little bit mixed up. It isn't a difficult job to separate them but I think I can go over them with the Clerk and if Mr. Deasy wants to be there when I do it—

The Court: You mean there are some things that are not records of the DeWitt Hospital?

Mr. Wertheimer: There are some from Tormey.

The Court: They are all included in one envelope. Have you got the record there that separates the two?

Mr. Deasy: No, your Honor. This (indicating) is mixed up even more than the others. I received this subsequent to the time we deposited these with the Court. These are all bound together and sealed up and certified here. I was just looking and I see they do have things which are headed Tormey General Hospital.

The Court: Maybe you could agree between you that you may take out of that record that you have there anything [5] that does not pertain to the DeWitt Hospital and then you could do that before tomorrow morning and then have the—what is left strictly from the DeWitt Hospital marked in evidence.

Mr. Deasy: We have to examine each page, your Honor.

The Court: Well, suppose that Mr. Wertheimer either take your record or the other record, it doesn't make any difference to the Court, after the recess and after we adjourn and get what you want included in what will be Plaintiff's Exhibit 3, in proper shape and then make the offer tomorrow morning, but I will make the order I have already made with respect to the exhibit as you present it tomorrow morning.

Mr. Wertheimer: Miss Canon.

Thereafter

MYRTLE CANON

called, sworn, testified as follows:

The Clerk: Will you state your name to the Court?

A. Miss Myrtle Canon.

The Clerk: Miss Myrtle Canon.

Direct Examination

By Mr. Wertheimer:

Q. Miss Canon, you are the plaintiff in this action, is that right? A. Yes, sir.

Q. Now, where do you live, Miss Canon? [6]

A. Well, I have, for the last year I have been in the California Hospital in Los Angeles and then I stayed with my aunt who is a nurse in Los Angeles.

Q. What is your present address?

A. Right now I am staying at the Hotel Albert here in San Francisco.

Q. But I mean in Los Angeles.

A. 2228 South Ridgely Drive.

Q. Now, how old are you? A. 36.

Q. And where were you born?

A. Lewiston, Montana.

Q. And did you move from there to Los Angeles?

A. Yes, I moved from there to Los Angeles when I was 15. That was in October of 1928, I believe.

Q. And where did you—When did you first go to work? A. For the Army, you mean?

(Testimony of Myrtle Canon.)

Q. No.

A. Well, I graduated from Santa Monica High School in 1931 and then I started working in various surgeons' offices in Santa Monica, and then I worked at the Culver City Hospital.

Q. You graduated from Santa Monica High School in 1931, and what was your first employment and where?

The Court: Do you need to go into that?

Mr. Wertheimer: Just a little background. [7]

Q. Let me ask you this: Did you act as a medical secretary prior to your going to work for the Army at Tormey Hospital in October of 1944?

A. Oh, yes, I worked in Dr. Adolph Koski's office in—

Mr. Deasy: Doctor who?

A. Koski, in Santa Monica.

Q. (By Dr. Wertheimer): Now, was he the first—was he your first—

A. (Interrupting): He was the first surgeon that I worked for.

Q. And he was a surgeon, was he?

A. He was a surgeon.

Q. How long did you work for him?

A. Oh, I had known Dr. Koski off and on for several years. I used to just relieve when his nurse went on a vacation I would say for three or four years in the summer time.

Q. Just in the summer time, is that right?

A. Well, usually when the girls went on a vaca-

(Testimony of Myrtle Canon.)

tion and then when I wasn't in his office I would relieve the nurse in other doctors' offices. I worked in Dr. James Ramsey's office in Santa Monica, and I worked for Dr. Kenneth McLaren, who is also a doctor in Santa Monica, and following that I worked in various hospitals. I worked in the California Lutheran and then I left there and—

Q. (Interrupting): Just a moment. Were you a medical secretary to the doctors you named, Koski and Ramsey? [8]

A. Doctor's office assistant. You do secretarial work and assisting.

Q. You act both as a nurse—

A. That is right.

Q. —and as a medical secretary?

A. Only I wasn't an R.N., or didn't give any narcotics or anything like that, but you assist with dressings and treatments and that sort of thing, examinations.

Q. Now, did you work for any other private doctors before you came to work for the Army?

A. Yes, I worked for Dr. Arthur Smith in Los Angeles. He is a plastic surgeon.

Q. How long did you work for him?

A. I relieved his nurse while she was on vacation and I was in the office, I think, about seven months. I assisted him with surgery which was performed in the office and photographs and assisted the receptionist and I took his graduate nurse's place while she was on vacation is what I did.

Q. Any other doctors?

A. That was the last doctor I worked for before I went to work for the Army.

Q. I see. Now did you work for any hospitals prior to coming—

A. (Interrupting): Yes, I worked at the Culver City Hospital. I went to work as a nurse's aide. They put me on as an [9] undergraduate. I was also a first aid instructor for the American Red Cross. I worked at the Cedars of Lebanon Hospital in the delivery room, and I worked at the California Hospital in surgery.

Q. We don't want to spend too much time on background, but what were your duties at these hospitals? Were you a nurse or a medical secretary?

A. I was a nurse's aide. You can't work as a nurse unless you are an R.N. I wasn't doing secretarial work in the hospital. I knew—in the California Hospital I knew the surgical set-up, the autoclaving and all that sort of thing, so I worked just in surgery.

Q. I see.

A. I did all of the instruments. I even instructed the student nurses at times on instruments because I like instruments and I knew instruments well, I think.

Q. Did you receive instructions in these hospitals on these instruments? A. Yes, yes.

Q. What training did you have as a medical secretary prior to your going to work in the Army?

A. I took some business training when I was in

(Testimony of Myrtle Canon.)

school and then Dr. Koski—I got most of my medical training actually postgraduate training at Dr. Koski's, Ramsey's and McLaren's offices. [10]

Q. I mean you learned to type?

A. I took typing at school.

Q. And did you learn to take dictation?

A. I did take shorthand but I didn't take too much shorthand. I did—most of those doctors had regular secretaries and I just assisted them. I didn't have full responsibility of the office.

Q. Now, did you work for the—did you work for any other hospitals or doctors prior to your going to work for the Army?

A. Just those that I mentioned.

Q. Just the ones you mentioned. Now, did you go to work for the Army?

A. Yes, I went to work for the Army.

Q. When? A. December '43.

Q. December of 1943?

A. It was either late December or early January. I believe my appointment was in December. I had taken the Civil Service examinations some months prior to that.

Q. Had you passed?

A. Yes, I took all of them. I took the L. A. City and County Board of Education, the State and the Federal, and I passed all of them, but I was given the privilege on my civil service employee appointment because of my medical [11] training. They

(Testimony of Myrtle Canon.)

needed medical secretaries at that time in the Army Hospitals.

Q. Now, what was your rating when you went to work for the hospital at Tormey?

A. At Tormey I went to work as a CAF-2, Clerk-typist.

Q. CAF-2, Clerk-typist. Where is Tormey located? A. Palm Springs, California.

Q. And what sort of work did you do there?

A. Well, I was in payroll just a few days and then I was in physio-therapy for a few weeks until they had—they found out that I had had plastic surgery, had worked for a plastic surgeon and was familiar with plastic surgery terminology, so I was made secretary to the Chief of Plastic Surgery in Burn Section. That was Major Gilbert Hyroop.

Q. Secretary, you say, of the plastic surgery section?

A. Plastic surgery burn section.

Q. Now, how long did you work there? When did you quit, when did you leave Tormey?

A. I left Tormey in October of 1944 and I transferred to DeWitt General Hospital.

Q. You transferred? A. Yes, transferred.

Q. At the time of your transfer, what was your rating?

A. I had been raised to, promoted to CAF-3.

Q. I see. Do you remember what the rate of pay for a [12] CAF-3 was at that time?

A. It was \$1620 per annum.

(Testimony of Myrtle Canon.)

Q. That was gross? A. Gross.

Q. And what was CAF-2, \$1440, I believe?

A. \$1440.

Q. Now, you were transferred to the DeWitt Hospital at Auburn? A. That is right.

Q. And for whom—when did you go to work there?

A. I went to work in October of 1944. I don't remember the date offhand.

Q. And who did you go to work for there?

The Court: Can't you ask leading questions on this and shorten it? Just ask her what job she had there and what her duties were. Would you answer that for me, what did you do at DeWitt?

A. Yes, I was secretary, I was executive secretary of the vascular surgical section up there. I went up there—

The Court (Interrupting): Never mind: You went. I was trying to shorten it and I just wanted to find out what you did. You were—besides that, did you do that work right along until the time you were operated on?

A. Yes, I did. I had a terrific amount of responsibility. I did all of the typing and all of the filing and I did all [13] of the monthly reports and I did all of the CDD reports and I did all of the retirement reports and I scheduled all surgery and when I scheduled—when they asked me to schedule surgery they would merely state the patient's name—

The Court: This is getting too much into detail.

(Testimony of Myrtle Canon.)

Now, you performed this work right up until the time you were operated on?

A. That is right. We went—

The Court (Interrupting): As secretary in this department.

A. We had almost 600 in that section at a time. I used to work up until six o'clock the following morning.

The Court: Go ahead, Mr. Wertheimer.

Q. (By Mr. Wertheimer): The Commanding Officer of that hospital was a man by the name of Smith? A. Colonel William Smith.

Q. And the man in charge of surgery was, general surgery, was Lt. Col. Stark?

A. Yes, Lt. Col. Stark was Chief of Surgical Services.

Q. He was Chief of Surgical Services?

A. That is right.

Q. At the time you first went to work there who was the head of vascular surgery?

A. Col. Kleinsasser was Chief then.

Q. Now, did Col. Kleinsasser stay there, did he, all of the [14] time you were there?

A. No, he went, he was transferred to an overseas installation on or about the 1st of May.

Q. And who took over his duties?

A. Major Norman Freeman.

Q. Now, did you have—did you work long hours there?

The Court: She has already told us that.

(Testimony of Myrtle Canon.)

Q. (By Mr. Wertheimer): Had you accumulated a lot of overtime?

A. I certainly had.

Q. Prior to your operation on June the 14th?

A. I certainly did. I worked every Saturday, Sunday and holiday.

Q. And did your work call for circulating about the wards to any extent?

A. Yes. I had to make the rounds with the doctors of all of the wards. We had five wards, and we had approximately 600 patients.

Q. Now, prior to your going to DeWitt had you had varicose veins?

A. Yes, I have had them for several years.

Q. You had had them for several years prior to going—

A. (Interrupting): But they didn't bother me.

Q. Had they worsened while you were up there?

A. Oh, yes. After I was on my feet a great deal up there [15] my legs used to ache me so bad when I would go home I could hardly stand it sometimes.

Q. Now, did you have an operation for varicose veins while you were in DeWitt Hospital?

A. Yes, I did on the 14th of June, 1945.

Q. And can you tell us the circumstances that led up to the performance of that operation?

A. Well, on or about the 1st of May I submitted my resignation to Colonel Stark. He refused to accept my resignation and tore it up and threw it in the waste basket on the basis—because he told

(Testimony of Myrtle Canon.)

me that I—in the first place medical secretaries were hard to obtain in that section and I used to help other sections besides mine. He said Major Kleinsasser had gone and Major Freeman was on his way in, and he said it would be my responsibility to see that the section ran smoothly until Major Freeman got his feet on the ground. That was the exact words that he said, so he asked me if there was anything else I would like.

Q. Now, this conversation occurred about the 1st of May, 1945?

A. It was around the 1st of May.

Q. In the Office of Colonel Stark?

A. In the Office of Colonel Stark.

Q. Who was head of the Surgical Service?

A. That is right. [16]

Q. Was there anyone else present besides yourself and Colonel Stark?

A. Well, his secretary was in the adjoining room. There was just an archway—

Q. (Interrupting): I see. Now, what else occurred at that conversation?

A. Oh, then I asked him if I could have some leave because I hadn't been off the post only one day and that was Christmas day of 1944. I told him I was tired and I wanted to get away for a while and he said that that wasn't the time for me to take my leave because of this new officer coming in.

Q. That would be Major Freeman?

(Testimony of Myrtle Canon.)

A. Major Freeman.

Q. —Who was going to take over vascular surgery?

A. That is right, he was on his way from China. So he asked me if there was anything else that he could do for me and I told him then that I had these varicose veins and that they were bothering me and I would like to go to a civilian hospital because I had Blue Cross Insurance and I planned to come down to San Francisco—I had planned San Francisco really for a ligation, and then he says, "Well—

Q. (Interrupting): Did you tell him that?

A. Yes, sir.

Q. That is exactly what you told him? [17]

A. That is exactly what I told him.

Q. Yes.

A. And he says well, we will do it here for you because we can get back on the job in two or three days. He told me, he stressed the fact he didn't have a replacement for me, that I was the only girl in the hospital up there that actually knew medical terminology as well as Army routine.

Q. Did he say anything to you about the possibility of continuing your work while you were in bed if you stayed up there?

A. Yes, that is another thing. He said, I have another stenographer who was helping me and she came in, oh, the latter part of April. She made the rounds with the doctors and he said that Mrs. Cole

(Testimony of Myrtle Canon.)

could take over my office but she didn't know the boards as I did, the boards and the final diagnosis and that sort of thing and he said as a matter of fact while you are still in the hospital if there is anything arises on the section Mrs. Cole can bring the charts down for your O.K., because I O.K.'d every chart that went out of the office. I even wrote the final summary of the section for Major Kleinsasser and I wrote all of the final summaries for Major Freeman, I didn't—

Q. He suggested you continue your work while you were in the hospital, in bed in the hospital?

A. That is right. [18]

Q. Anything else said at that time about the operation?

A. Well, the only thing that he did tell me he said when do you want it done? He told me I could have it done at any time that I wanted to at my convenience, and then the only thing he said was Major Freeman is going to have a month's leave when he comes in, and he said when Major Freeman is gone the work on the section will be relatively light because there will be no surgery, big surgery going on, and you can have your surgery then while Major Freeman is away. He said Captain Rector can't do it because he will be acting—Acting Chief in Vascular in Major Freeman's absence.

Q. Did he say anything about getting any O.K. on the operation from—

A. Yes. When he mentioned the fact to me about

(Testimony of Myrtle Canon.)

having the surgery done in an Army hospital I didn't say anything, but he said I will call—I will talk it over with Colonel Smith, is what he said.

Q. Who was Colonel Smith?

A. Colonel Smith was our Commanding Officer. He said I will call you in the morning and let you know. He said why don't you take the afternoon off because you have been working so hard, and I said, No, I have got about six boards coming up in the morning so I went on back to the office. I didn't take any time off. He called me early the next morning and told me I could have my surgery then [19] any time I liked.

Q. Then what did you do?

A. Well, Major Freeman came in and I worked with him for about six weeks and then he left and took a month's leave and went back to Philadelphia.

Q. And about when did he leave, do you recall?

A. He left just a few days before I went to the hospital, as I remember.

Q. About—

A. I would say around the 10th of June.

Q. By the way, do you know of your own knowledge whether the hospital—where is the hospital located at Auburn?

A. It was outside of Auburn, it was about 10 or 12 miles north.

Q. Ten or twelve miles north. Do you know whether or not the hospital was having difficulty getting help at that time?

A. I know they were because Major Kleinsasser

(Testimony of Myrtle Canon.)

had asked for an assistant for me for months and personnel said they just couldn't get anybody. Once in a while they would send me a soldier's wife who was—you know, a soldier's wife following her husband around the camps, but they couldn't get—they didn't know medical terminology and they didn't know Army routine, and by the time you instructed them, most of them weren't interested in the work anyway and it [20] took me twice as long to instruct them than maybe having to do their work over so I decided to do it myself because I could do it once and get it out of the way.

Q. Did you hear any of the personnel people or Colonel Stark or Colonel Smith comment on the difficulty of obtaining help?

A. Oh, yes, it was generally acknowledged around there that it was hard to get help up there.

Q. Was that due to the war effort in bringing—

Mr. Deasy: I object to that.

The Court: Yes, sustained.

Mr. Deasy: As immaterial and calling for her conclusion.

Q. (By Mr. Wertheimer): Do you know whether it was due in part to the fact that Auburn was relatively isolated?

Mr. Deasy: I make the same objection.

The Court: Yes, that is mere accumulative what is the reason for it. She has already stated that it was difficult to get help.

(Testimony of Myrtle Canon.)

By the way, what was your rating at the time you had the operation?

A. I was still CAF-3. Major Kleinsasser had before he left recommended my promotion to -4, but they didn't act on it and then Major Freeman came and when they came down from personnel and asked them about me he said, "Miss Hawkins [21] I have only seen Miss Canon for a couple of weeks, but I can tell you this much, she is not the run of the mill."

The Court: Madam, really this conversation is all immaterial. All I want to find out is what your rating was. You hadn't yet had a raise in rate at the time of the operation actually, is that right?

A. No, but they acted on it.

The Court: You would have gotten it?

A. I would have gotten it.

The Court: All right.

Q. (By Mr. Wertheimer): You had been recommended for CAF-4, is that correct?

A. That is right.

Q. And as I understand it—had that been acted upon, do you know?

A. It finally was acted upon and they refused it because I wasn't the secretary to a chief of a service. I was a section chief secretary and those jobs were all so—literally, they were sewed up, the three jobs.

Q. Had you received the normal promotions at the time of the operation, if you remember?

A. Yes, I had.

(Testimony of Myrtle Canon.)

Q. Do you remember what your salary was at the time you were operated on on June 14th?

A. I think it was 1920. [22]

Q. Around 1920, is that your best recollection on the point? A. Yes, as I remember it.

Q. Now, did anybody examine you prior to your operation that was performed upon you, upon your first varicose vein? A. At DeWitt, you mean?

Q. Yes.

A. Yes, Captain Rector examined me. So did Major Kleinsasser and so did Major Freeman and Phlebro Graphs were also taken.

Q. Phlebrographs?

A. That is where they inject fluids into the veins to take x-rays.

Q. And it was then determined that Dr. Rector would perform the operation?

A. That is right.

Q. While Major Freeman was away?

A. That is right.

Q. And the work was lighter?

A. That is right.

Q. Now, do you remember whether or not you had any—the operations were performed when, do you recall that? June the 14th, was it?

A. The 14th of June.

Q. The 14th of June. Now, did you have a routine examination before the operation?

A. Oh, yes. [23]

(Testimony of Myrtle Canon.)

Q. Were you suffering from any infection of any kind— A. No.

Q. —prior to the operation?

A. I wasn't. They told me I was in excellent physical condition other than the varicose veins in my legs.

Q. And who told you that?

A. Captain Rector.

Q. And he took a urinalysis, did he?

A. I had a urinalysis, a routine CBC. We make—

The Court: What is a CBC?

A. A complete blood count and bleeding and clotting time.

Q. (By Mr. Wertheimer): And a test for white cells? A. That is the CBC.

Q. That is the CBC. Now, what was your weight, if you recall, at the time you were operated upon?

A. I think it was around 190. Between 185 and 190. I think I was nearer 90.

Q. And you were in good health?

A. Yes, I was.

Q. Now, do you recall being operated upon on June the 14th, 1945? A. That's right.

Q. And you had some experience with operations of that kind, isn't that correct?

A. Oh, yes, we had lots of them on the section.

Q. Then were you under an anesthetic when the operation was performed?

A. They start under a local but they finish it

(Testimony of Myrtle Canon.)

under sodium pentethol so it was completed under a general anesthetic. I wasn't awake.

Q. But you were returned to your room, returned to—it was a private room or was it a ward?

A. I was in a private room in the beginning.

Q. Now, did you recover consciousness after the operation?

A. Oh, a short time afterwards. I don't know how long it was.

Q. And where had the—where had the surgery been performed, when had the incisions been made?

A. Well, they had made incisions in the calf of the leg to take out what they call—

Q. (Interrupting): Which leg was this?

A. They only did one. They intended to do the two of them but Colonel Stark—

Mr. Deasy: I move to strike out what they intended to do.

The Court: Yes. The lady's left leg is the only leg that was operated on.

Mr. Wertheimer: That is right.

Q. Now, what incisions did they make?

A. They made one on the, what they call the medial aspect [25] of the calf.

Q. Show—

A. (Interrupting): It is on the inside of the calf of the leg and another one in the popliteal space, which is in the joint of the knee.

Q. In what space? A. The popliteal.

Q. And where is that?

(Testimony of Myrtle Canon.)

A. That is right in the bend of the knee.

Q. Right in the bend of the knee there, indicating the inside, is that correct?

A. And that is the medial aspect (indicating), yes, and then inside—

Q. (Interrupting): Any other incision?

A. And then they do the actual tying off of the, of what they call the saphenous vein at the junction of the femoral artery. It is right in the groin. That is what they call a high and low saphenous vein ligation.

Q. Right in the groin? A. That is right.

Q. Now, do you recall after the operation seeing a bandage?

A. Yes. They always wrap the complete limb in what they call an Ace bandage.

Mr. Deasy: I move to strike out what they always do.

The Court: Mr. Wertheimer, I think we can proceed [26] a little more rapidly if you get Miss Canon just to answer directly the question. It saves a lot of time of all of us. All he asked you was whether you saw a bandage. Now, you can say yes or no to that, see what I mean? But instead you start to give a discussion as to what they always do. Now, that makes it difficult. I am explaining this to you so that you won't think I am arbitrary.

The Witness: I know.

The Court: It just makes it more difficult for the Judge to follow the evidence if you indulge in these

(Testimony of Myrtle Canon.)

general statements, because then I get led off the track of what the attorney is trying to bring out that is pertinent. So you can be helpful to us if you will just try to answer directly the questions and not volunteer anything.

The Witness: Thank you.

Q. (By Mr. Wertheimer): Did you see the bandage after the operation? A. Yes, I did.

Q. Can you describe it?

A. It was just the routine dressing that they put on for—

Q. (Interrupting): That is the kind of the thing Judge Goodman doesn't want you to do. Just tell us what you saw.

The Court: What kind of a bandage was it?

A. It was just the whole leg was bandaged in Ace bandage and the pressure bandages over the wound in the groin. [27]

Q. (By Mr. Wertheimer): The bandage extended then, did it, from the—

A. (Interrupting): From the toes to the thigh.

Q. From the toes to the thigh. Just a continuous strip of bandage. Was it on reasonably tight?

A. They always put them firm.

Mr. Deasy: I move to strike that out upon the ground—the question, your Honor, was whether it was reasonably tight.

The Court: He wants to know what you can tell us whether the bandage was reasonably tight, whatever that means.

(Testimony of Myrtle Canon.)

A. Yes.

Mr. Wertheimer: I will withdraw the question.

The Court: I don't see the pertinency of what kind of a bandage was on. Now, these details are really not getting down to the real question we have here and they take up an awful lot of time.

Mr. Wertheimer: Well, I have to, your Honor—

The Court: Well, you can take it for granted the Judge knows what it means when a person is operated on, but can't we get up to the point of where there was something developed that has some relationship to your claim here?

Q. (By Mr. Wertheimer): Do you recall having a fever after the operation, Miss Canon?

A. Yes. I was very miserable right after surgery.

Q. Did you feel any pain?

A. Yes, I did. I had terrific pain in the lower left quadrant of the abdomen.

Q. And what does that mean?

A. The lower left side.

Q. Did you have any pain in the leg as well?

A. The whole leg, but especially a lot of pain in the left side.

Q. Can you tell us when that began?

A. I was conscious of it as soon as I came out of the anesthetic.

Q. And did that pain continue?

A. Yes, it did.

Q. For how long?

A. Well, indefinitely, as far as I can remember.

(Testimony of Myrtle Canon.)

Q. Yes, but did you complain of pain?

A. Oh, yes.

Q. —To the nurses? A. That is right.

Q. And to Dr. Rector? A. Dr. Rector.

Q. You did complain to Dr. Rector of the pain?

A. Yes, I did.

Q. Did he give you sedation? A. Yes.

Q. —for the pain? [29]

A. That is right.

Q. Now, did you, when was the bandage removed?

A. It was about the eighth or ninth day. I remember he took sutures out on that day.

Q. And you saw him do that?

A. Yes, I saw him.

Q. Now let me ask you this, Miss Cannon. Prior to his removal of the bandage, did you attempt to touch that wound in any way?

A. No, I didn't.

Q. With your fingers?

A. No. You couldn't, because the whole things was bandaged clear from your toes up.

Q. With any instrument did you?

A. Nothing.

Q. Did you at any time while you were in the Army hospital from the time you left until you went to the—to go to the University of California Hospital touch with your fingers or any instrument the wound or incision? A. No, sir, I did not.

Q. —Or the ulcer?

(Testimony of Myrtle Canon.)

The Court: I think, Mr. Wertheimer, that probably we should take an adjournment at this time until tomorrow morning.

Mr. Wertheimer: All right, your Honor. [30]

The Court: We spent an awful lot of time in argument but it may be helpful in the final determination of the case.

We will take a recess until ten o'clock. [31]

Wednesday, March 23, 1949

The Clerk: Canon versus the United States.

Mr. Wertheimer: Ready.

Mr. Deasy: Ready.

Mr. Wertheimer: If it is agreeable to the Court and Mr. Deasy, I would like to call Miss Canon for a question or two and then interrupt her examination with that of Dr. Esnard.

The Court: Is the doctor here?

Mr. Wertheimer: Yes.

The Court: Would you like to put him on now?

Mr. Wertheimer: I thought I would just finish up a question or two with Miss Canon.

Thereafter,

MYRTLE CANON

resumed, testified as follows:

Further Direct Examination

By Mr. Wertheimer:

Q. Miss Canon, I think you were testifying yesterday that you said you were bandaged with an Ace

(Testimony of Myrtle Canon.)

bandage from your ankle up to your groin, is that right? A. That is correct.

Q. Now, did you at any time tamper with that bandage or touch the wound? [32] A. No.

Q. You recall—do you have any recollection as to when the bandage was first removed?

A. As I remember it was on the eighth or ninth day.

Q. The eighth or ninth day?

A. Because it was at that time that he took the sutures out, I believe.

Q. At the time he took the sutures out?

A. That is right.

Q. Do you have any recollection whether prior to that the wound had bled?

A. I don't remember. I didn't glance at the dressing as he took it off.

Q. But during the eight or nine day period you had a temperature, did you? A. Yes, sir.

Q. And you had pain? A. Yes, sir.

Q. —In your leg, in the lower left quadrant of your abdomen, is that right?

A. That is right, yes, sir.

Q. Now, did you have a chance to observe the wound when he took the dressing off to remove the sutures?

A. Well, I just glanced at it when he took the sutures out and then he asked the nurse—I just glanced at it and [33] at a glance it looked to me as though the skin had just—wasn't together, and

(Testimony of Myrtle Canon.)

had separated, and I remember he made a statement to the nurse, he said, would you give me some adhesive butterflies, that is adhesive tape that they cut and put across a wound to hold it, to keep it from separating. He said I don't think that it will do any good.

Q. (Interrupting): Who did he say that to?

A. The nurse. He said, will you please give me some butterflies and I will put them on but I don't think it will do any good because I don't think it will hold.

Q. What are butterflies?

A. Butterflies are pieces of adhesive tape. They cut a little "V" and invert it and then they pull the skin edges together and put them across to hold the skin edges together.

Q. And then did he rebandage it? A. Yes.

Q. Was there anything else said on that occasion, do you recall?

A. I don't remember anything else being said.

Q. Now, was there another bandage applied?

A. Yes, he applied another dressing.

Q. And was an Ace bandage applied over that?

A. Yes.

Q. You continued to suffer pain, did you?

A. Yes, it began to get more extreme at that time. [34]

Q. It began to get more extreme and you complained about the pain? A. Yes, I did.

Mr. Wertheimer: I think before going into the details of the treatment of Miss Canon at the hos-

(Testimony of Myrtle Canon.)

pital further, I will put Dr. Esnard on, if I may.

The Court: Very well.

Mr. Wertheimer: Thank you, Miss Canon.

Thereafter,

DR. RAOUL ESNARD.

called, sworn, testified as follows:

The Clerk: Your name in full?

A. Dr. Raoul Esnard.

The Clerk: Please take the witness chair.

A. Thank you.

Direct Examination

By Mr. Wertheimer:

Q. Doctor, where are you living, Doctor?

A. In Los Angeles.

Q. And you are practicing medicine there?

A. Yes.

Q. Where were you—what is your age?

A. 48.

Q. Where were you—where did you get your medical education?

A. I graduated from the St. Louis University School of [35] Medicine.

Q. And you are licensed, Doctor, in the State of California? A. Yes.

Q. Are you affiliated with any hospitals in Los Angeles?

A. I am on the staff of the Cedars of Lebanon Hospital and the California Hospital.

(Testimony of Dr. Raoul Esnard.)

Q. The California Hospital, also known as the California Lutheran Hospital?

A. That's right.

Q. Now what, how long have you been in practice? A. Since, oh, 20 years, 1929.

Q. And what of your practice, was that all in California? A. Yes.

Q. And what has your practice been, what has your practice consisted of?

A. General practice with special attention to surgery.

Q. Special attention to surgery. Are you a Member of the American College of Surgeons?

A. Yes.

Q. Now, do you recall seeing Miss Myrtle Canon some time during January of 1948? A. '48?

Q. During—

A. (Interrupting): Yes, on the 29th of January.

Q. The 29th of January, and did you make an examination of her [36] at that time? A. Yes.

Q. Can you tell us what you discovered?

A. She had extensive swelling and inflammation with a large ulcer on the anterior surface of the left leg. The leg was quite swollen and she had numerous healed scars over both legs and the abdomen and chest. She had a draining sinus on the anterior surface of the abdomen just a little to the right of the umbilicus with three small sinus openings. She was running a temperature at that time and having

(Testimony of Dr. Raoul Esnard.)

—complaining of pain both from the leg and from the sinus tract on her abdomen.

Q. Did you take at that time any pictures of her?

A. Not at that time.

Q. But subsequently?

A. I never took any pictures, but one of the doctors in the hospital—

Q. But the hospital did. You have those with you, have you? A. Yes.

Q. Did you make any effort to determine what it was that was wrong with her?

A. I established a diagnosis that *she thrombo phlebitis* with a cellulitis of the leg, of the left leg.

Q. And what did you call that? [37]

A. A thrombo phlebitis with cellulitis of the left leg and then this draining ulcer on the abdomen. She was hospitalized and both conditions were treated.

Q. Now, what treatment did you give the leg?

A. Leg elevation, ice, antibiotics and what we call a perivertebral block which tends to relax the blood vessels on the leg. An antibiotic dressing to the ulcer and cellulitis of the leg. It responded to treatment. The ulcer—the cellulitis subsided and the ulcer healed.

Q. That is in the leg? A. That is right.

Q. Now, pursuing—is that—was that the extent of your treatment of her left leg?

A. Well, from time to time the leg would flare up and become painful and swell, particularly if

(Testimony of Dr. Raoul Esnard.)

she was ambulatory at all, but only on two occasions did she, that I can recall, that the pain became very severe in the leg. There has always been some swelling in the left leg, which has been larger than the right leg as I have seen it.

Q. Has been what? A. The left one.

Q. I didn't hear that word, Doctor.

A. The left leg has been larger than the right leg.

Q. Now, did you give any treatment to the ulcer that I think you described was in the abdomen at that time? [38]

A. Yes, many and various things. We excised it, debrided it and ultimately did skin grafts. We excised the involved area and let it granulate. The last time I excised the involved area and closed it by a primary closure, a portion of it subsequently broke down. Now she has a persistent sinus tract that has extended up on the right side of the abdomen and up to the chest.

Q. That is something that she has at the present time? A. Yes.

Q. Do you recall, did she require any drugs to build up her resistance?

A. Well, she had numerous transfusions and she received massive doses of penicillin, streptomycin, and we tried x-ray therapy on it and then topically I was able to get some vasatracin, that is one of the recenter antibiotics that is applied locally and a zinc bioxid and penicillin solution applied locally

(Testimony of Dr. Raoul Esnard.)

and scarlet red and anything else we could think of. At the moment we are using penicillin powder directly on the wound.

Q. Do you recall off hand how many transfusions she has had since she has been in the hospital?

A. I think about 12 or 13, her last one—

Q. You spoke of operations of the ulcer. How many operations? A. Ten.

Q. Requiring a general anesthetic? [39]

A. Ten.

Q. Was she in pain, incidentally, from the leg while the ulcer—

A. (Interrupting) Both.

Q. Did you make any diagnosis as to what this ulcer was?

A. It was a mixed infection. We were able to isolate and identify a micro-aerophilic strep as described by Melony which is characterized by a type of lesion that she has on her abdomen.

Q. Is that known as a kind of a phagodenic ulcer? A. That is right.

Q. Which means a burrowing or undermining ulcer? A. That is right.

Q. Now, your diagnosis of that was based on a behavior of the ulcer and the isolation of this micro-aerophilic strep. Did you isolate any other bacteria?

A. A culture of the surface of one of them did give us a primary puiosziamious, a staff puiosziamious which was the most consistent secondary infection that we had to deal with.

(Testimony of Dr. Raoul Esnard.)

Q. Is the micro-aerophilic strep a deep burrowing one?

A. Yes, it is one that grows best where there is little or no oxygen. It burrows into the tissue. That is why a topical antibiotic is not very effective.

Q. What does that mean, a topical? [40]

A. Things you put on the wound.

Q. So that would you say that—what was the zinc bioxide treatment, for the purpose of attacking that particular disease?

A. It replenishes the oxygen in the tissue and of course the aerophilic strep doesn't do well in the presence of oxygen and it tends to inhibit the growth of the bacteria.

Q. Is this type of infection characterized by hemorrhage, Doctor?

A. All strep infections are characterized by sero sanguinous types of drainage. In this particular case where small blood vessels are eroded you can have extensive and quite frequently some bleeding.

Q. Now, did you ever notice whether her bandages were blood soaked?

A. Practically always there was some drainage on the dressing.

Q. Did you—did you ever find any evidence, Doctor—let's see, I take it that in the year she has been there to the best of your belief, with all of your efforts the ulcer has continued burrowing and undermining?

A. That is right.

(Testimony of Dr. Raoul Esnard.)

Q. Did you ever find any evidence, Doctor, that she herself was tampering with that ulcer?

A. No.

Q. Is there anything in the nature of that infection that [41] would indicate to you whether its continuance and progress was caused by her tampering? A. No.

Q. Well, did you have—is there anything in the infection or its progress or the way in which it looks that indicates that its forward movement or aggressive action, its continuance wasn't caused by tampering? A. Would you repeat that, please?

Q. I will make it a little clearer. Is there anything about the way the infection behaved and the way it advances as determined by your observations, surgical or otherwise, that indicate that this kind of infection and its progress is not caused by self tampering?

A. That is correct. It isn't caused by self tampering.

Q. Well, what is the basis for your saying that, what is it about it that makes you say that?

A. One of the most significant things is the character of the tissue around the ulcer. When the wound is excised part of the tract is excised widely, as much as three or four centimeters from the tract itself and you can find all of the blood vessels, both the arteries and the veins thrombosed. That is, the lumen is closed by clots which means that the infection is away beyond the sinus tract and in order to

(Testimony of Dr. Raoul Esnard.)

cure it, you have to excise so widely that you normally take out all of the sinus tract, being the little blood vessels [42] along which the infection travels.

Q. Those were ones which weren't reached by any instrument?

A. Of course not; it couldn't possibly be.

Q. Couldn't possibly be. Now, has there been—withdraw that. This fever that she has had, has that been consistent or— A. Well—

Q. Interrupting): —constant or occasional?

A. Whenever the wound drains, well, she has a little running of temperature.

Q. You mean with this bloody sero sanguinous discharge, is that what you are referring to drains?

A. That is right.

Q. Did you take any, or any staff doctor there take any, photographs of her abdomen?

A. One of the doctors on the staff did.

Q. Do you happen to have that or do you know when they were taken?

A. I can't say exactly. They were taken several months ago. Two or three months, perhaps.

Q. About two or three months ago. These show two or three abdomens. Did she have additional scars on her back?

A. I don't think so at that time. I subsequently—those pictures show a small area of ulceration which extend away posteriorly under the skin. [43]

Q. Yes.

A. —And subsequent to that picture they were excised so for a time it extended way back.

(Testimony of Dr. Raoul Esnard.)

Mr. Wertheimer: I offer these in evidence.

Mr. Deasy: We have these DeWitt Hospital records entered into evidence as Exhibit 3, is that correct?

Mr. Wertheimer: Yes.

Mr. Deasy: Then these pictures would be 4 and 5.

Mr. Wertheimer: DeWitt or Tormey?

Mr. Deasy: These are separate, these are DeWitt records.

Mr. Wertheimer: Yes.

Mr. Deasy: I understand those pictures, Doctor, were taken the early part of this year 1949?

A. No, I am sure they were taken late last year.

Mr. Deasy: Late in 1948?

A. Yes. I can't recall exactly when they were taken.

Q. (By Mr. Wertheimer): Now, can you describe to us, Doctor, what the present condition of Mrs. Canon is?

A. Well, she has an impairment of the circulation of her left leg with the associated swelling and pain and she has a progression of the original infection of the abdomen which will have to be excised again. We hope this time we might be able to get it all and get a primary union.

Q. Well, does her leg swell? [44]

A. Yes.

Q. Now, with respect to this ulcer, is there any certainty that you can cure her of this ulcer that has persisted for four years? A. No.

(Testimony of Dr. Raoul Esnard.)

Q. But you are still hopeful and you are still trying, is that right? A. Yes.

Q. Is she in condition to do any work?

A. No, certainly no work that involves standing on her feet or walking.

Q. Is she getting medical care at the present time?

A. Yes, she is getting some pain medication and as I say penicillin locally.

Q. And what about the dressings? Are they being changed?

A. Since she has come up to San Francisco I think the Army changed them once and I hope to change them before I leave. They should be changed frequently though.

Q. What about—what was the last transfusion that you gave her?

A. I think that was Friday of last week.

Q. Is it possible or likely that—is it likely she will receive transfusions in the future?

A. She should have more before her next surgery.

Q. This sinus you spoke of is still draining? [45]

A. Yes, and extending.

Q. On her right side.

The Court: This phlebitis has been arrested, has it not?

The Witness: Well, at the moment she has just the result of impairment of circulation in the leg.

The Court: That is residual.

(Testimony of Dr. Raoul Esnard.)

The Witness: No interference with the circulation. Of course, she has had flare-ups of phlebitis. The actual inflammatory process has recurred.

Q. (By Mr. Wertheimer): Was that condition she had in her leg a consequence of this infection in any respect, or the treatment of the infection?

A. I understand that, of course, originally the saphenous ligation and then the extensive hospitalization and excising some of the veins in the leg with the natural direction of the red supply available, plus the infection that existed in that area were all contributory to her present impaired circulation.

Q. In other words, the thrombo-phlebitis is not something as far as you know she had before all of this occurred, it is a consequence of the treatment that she had?

A. Yes, in all probability.

Q. Now, Doctor, let us assume that Miss Canon was operated upon on June 14, 1945, and thereafter commencing within a [46] day and for a period of six or seven days she ran a low grade temperature, no higher than 101 and ranging from 99 to 100 or 101 following the operation, would that be an indication of infection? A. Yes.

Q. And if in addition to the temperature she complained of pain in her leg and in her lower, the lower left quadrant of her abdomen, would that reinforce your answer, would that also indicate infection? A. Yes.

Q. And now, if in addition to that she, on the

(Testimony of Dr. Raoul Esnard.)

9th, on or about the ninth day following the operation, the wound broke open and exuded a sanguinal serros material, would that be a further indication of infection? A. Yes.

Q. Would you say it was a bad medical practice in accordance with the way medicine was practiced in the State of California in 1945 not to recognize that those symptoms indicated infection?

A. Yes.

Q. And would you say, Doctor, that if the symptoms that I have described occurred that a failure to make a culture of the sangrenal currus exudate which commenced on or about the ninth day following the operation was bad medical practice and negligence? [47] A. Yes.

Q. Would you say that the presence of the low grade temperature for a period of two or three or four days following the operation was an indication of infection?

A. Low grade, meaning what?

Q. Well, from 99 to 101 plus. A. Yes.

Q. Now, with the symptoms that I have just described to you present, the persistence of the temperature at that approximate point for the period indicated and the exudation of the sanguinous serros material and the existence of pain in the patient's leg, would you say that good medical practice would have at that time and in this State prescribed the use of sulpha, some compound of sulpha or penicillin or both? A. Yes.

(Testimony of Dr. Raoul Esnard.)

Q. Would you say it was bad medical practice in those circumstances and negligence not to have prescribed one or both of those drugs?

A. Yes.

Q. And if, Doctor, a culture had been taken from the sanguinal serros exudate on or about the ninth day after the operation and it disclosed a hemolitic staphylococcus orios that would have very clearly indicated that the wound was infected, isn't that right, Doctor? [48] A. Yes.

Q. And you would say that it was negligence and bad medical practice at that time and in this State not to have taken steps at that time to arrest the infection with the use of penicillin or streptomycin or sulpha?

Mr. Deasy: I object to that upon the ground it is leading and suggestive and also as complex and indefinite as to the time he is referring to.

The Court: I think it is.

Mr. Deasy: I can't understand the question at all.

Mr. Wertheimer: Withdraw the question, withdraw the question.

The Court: The last is objectionable, I think.

Q. (By Mr. Wertheimer): You are familiar with the use of—as a doctor, with the use of sulpha compounds and penicillin? A. Yes.

Q. Is that correct, and now is it not—is it your opinion that if an infection is discovered to be present that it is poor medical practice not to give one

(Testimony of Dr. Raoul Esnard.)
or both of these drugs earlier in adequate quantities? A. Yes.

Q. And it is a fact, is it not, that if there is—if the administration of a sulpha compound or penicillin is delayed the organism causing the infection would have a chance [49] to become better established and more difficult to deal with later?

A. Yes.

Q. In fact, the patient may develop a drug fastness, in other words, if the drugs would have been administered earlier it would have controlled the infection but then becoming later become unavailing, isn't that correct?

A. Well, you can only develop a drug fastness after having received the drug, but it is the bacteria that develop the resistance to the drug if given in small quantities.

Q. Well, my question may have been misleading, and what I wanted to say was this: that it is bad medical practice not to give these, I think you have testified, to not give these drugs early when infection is present, isn't that correct?

A. Not to, yes.

Q. Yes. Now, with relation to the question of the adequacy of the amount given, it is a fact, is it not, that if drugs when first given, a sulpha compound or a penicillin, when they are not given in adequate quantities the bacteria tend to become resistant? A. Yes.

Q. So that the proper dose and the proper medical treatment is early and adequate dosage?

(Testimony of Dr. Raoul Esnard.)

A. That is right.

Q. And it is negligent not to give this treatment where an [50] infection is present, isn't that correct, Doctor? A. Yes.

Q. Now, if, Doctor, an incision was made into this wound, the wound in the groin on July 13, 1945, and it indicated and there was present a chronic inflammation or a cellulitis, a fatty necrosis of tissue, would that have been some indication that the infection had persisted since surgery?

A. Yes.

Q. And would it be any indication to you of the kind of infection she had?

A. Well, the character of the drainage would suggest the type of infection that she had.

Q. Would you mind explaining that a little bit?

A. Well, certain bacteria produces pus which is somewhat characteristic of that particular strain. Puiosziamious produces a greenish pus. Colon bacillus produces an offensive smelling pus, foul smelling, and streptococcus produces a bloody watery type of exudate, so that would certain indicate the type of infection that you might be dealing with.

Q. In other words, the absence of pus in the early stage wasn't evidence that there was no infection?

A. No, sometimes you don't have pus at all in the infection.

Q. And the bloody exudate indicating a streptococcus type of infection—

(Testimony of Dr. Raoul Esnard.)

A. (Interrupting): It suggests that type. [51]

Q. Now, if a micro-aerophilic streptococcus were found by a culture would that be indicative that there was a phagodenic ulcer?

A. Well, I don't know whether all phagodenic ulcers are caused by micro-aerophilic strep, I don't know whether that—identifying that organism would necessitate an ulcer, but where an ulcer exists and that particular strep is isolated, then you can conclude that you are dealing with a phagodenic ulcer.

Q. And in your opinion what effect would the administration of one of the sulpha drugs or, and/or a penicillin with a week of ten days from the operation, what effect would that have had upon Miss Canon's infection in this case?

The Court: You are asking the doctor now to—

Mr. Wertheimer (Interrupting): It is his opinion.

The Court: —to take the place of God.

Mr. Wertheimer: It is only an opinion, your Honor.

The Court: Of course, he can tell you what the statistics are or what has happened within his time, but he couldn't tell you in any particular case what the effect of the administration of any drug would be unless he was there and knew all of the conditions at that time, isn't that correct, Doctor?

The Witness: That is right, your Honor.

(Testimony of Dr. Raoul Esnard.)

Q. (By Mr. Wertheimer): Well, in your opinion, would—— [52]

The Court: What you are asking him is good medical practice to administer these drugs under the conditions. He states that is right, and he has already told you that it is, it is good medical practice, and I assume that is true because of the fact that it produces generally good results, isn't that right, Doctor? A. Yes.

Mr. Wertheimer: I think he has gone farther than that. I think he has said it was bad medical practice not to have done so and negligent not to.

The Court: The United States Attorney didn't object to it, but he couldn't say that was negligent. All he can say is that it wasn't in conformity with the recognized medical practice at the time.

Mr. Wertheimer: That is right. I realize that that is the ultimate question to be decided by your Honor.

Q. Can you say, Doctor, whether there was anything about this particular infection that would have indicated one way or another whether it was produced by self infliction?

The Court: He has already answered you on that, Counsel. He told you there was no evidence of that. You are back-tracking now and going over the same ground.

Mr. Wertheimer: I think it is a little different question, your Honor, but I guess that takes care of it. Doctor, do you have an opinion—well, withdraw that. [53]

(Testimony of Dr. Raoul Esnard.)

Q. Let us assume, Doctor, that prior to the operation Miss Canon was free from infection and that following the operation she displayed the symptoms of infection. Do you have an opinion as to what caused—what is your best opinion as to what caused the infection?

Mr. Deasy: I will object to that, your Honor, first on the ground that there is no evidence that prior to the operation she was free from infection.

The Court: Yes. She has already testified to that. I don't think the question is subject to that objection but again I think he is asking the Doctor to play the part of God, as I put it. How could he possibly tell what was the cause of this. He wasn't there and he didn't see it.

Mr. Deasy: I will object to the question on the ground it is speculative also, your Honor.

The Court: Well, I think it is objectionable on that ground.

Mr. Wertheimer: Well, all right.

Q. Doctor, do you have an opinion as to whether or not this infection was caused by contact of the wound or incision with some contaminated object?

The Witness: Your Honor, I mean obviously that had to be the explanation of it, but what and how—

The Court (Interrupting): Couldn't an infection develop for other reasons? [54]

A. There is one other reason. If a person has a few bacteria and that frequently does occur in

(Testimony of Dr. Raoul Esnard.)

the blood stream, that might settle in an area that had been traumatized, but that is extremely unusual.

The Court: Are you saying that the only way that an infection can develop in a person that has been operated on is because of some contaminated instrument or other object being brought in contact with it?

A. I think perhaps unless it is a sterile abscess where—

The Court (Interrupting): Don't people develop infections countless times after operations that result from conditions in the body of the person and have nothing to do with the use of instruments or any other evolvement of that?

The Witness: Not where bacteria are involved. I mean, you have to have bacteria and they have to get in there some way, your Honor. Now, a sterile abscess, we know for instance that some people are allergic to catgut. You use catgut to sew them up and they will get quite a violent reaction around the suture and the wound will drain and just as soon as the catgut is excluded from the wound the wound heals.

The Court: Well, suppose the patient has some other condition at the time.

The Witness: In diabetes— [55]

The Court: —exacerbated by the wound plus an infection—

The Witness (Interrupting): You have to have

(Testimony of Dr. Raoul Esnard.)

the bacteria in there. They have to get into the wound.

The Court: I see.

The Witness: If they had diabetes, it would make them more susceptible to the infection or in anemia. They are contributory things.

The Court: But your testimony is that in infection that—where there are present the type of bacteria you mentioned it can only be produced by—as a result of some contamination?

The Witness: Or—it would be in the blood stream which, as I say, is extremely unlikely.

The Court: You mean an infection already in the blood stream?

The Witness: That is right.

The Court: That is to say a streptococcus infection already in the blood stream?

The Witness: In the blood stream, and then it would settle in that particular place. The bacteria—

The Court: In other words, a person could have, say, a diseased tonsil which would also produce a blood stream infection, it might?

The Witness: Then they would have to have septicemia.

The Court: Then they would have to have some other evidence to cause that? [56]

The Witness: Yes.

The Court: Does that cover about what you want?

(Testimony of Dr. Raoul Esnard.)

Mr. Wertheimer: I think it does, Judge.

The Court: All right. Well, while I have been asking these questions, may I ask you your interpretation of another question? Now, a phlebitis is what, what is its character?

A. It is characterized by an inflammatory process in the line of the vein with the resulting clot of the blood in the vein and the impairment in circulation.

The Court: Now that, is that ever from a traumatic infection?

A. Well, there are a good many arguments about that. I mean—

The Court (Interrupting): I have heard some of them, that is why I am asking.

A. If after a trauma they develop a phlebitis that is something that is remote to the area involved.

The Court: Ordinarily, however, a phlebitis is a disease that develops irrespective of trauma, is that right?

A. Trauma alone is not the cause of it. It may, however, be caused as I say when you inject the vein in treating a varicose vein you bruise the lamina.

The Court: That would be a means of bruising it?

A. Yes.

Q. (By Mr. Wertheimer): And if a radical sauserization has been performed in that area, that would likewise be a [57] cause of phlebitis?

(Testimony of Dr. Raoul Esnard.)

A. Well, you see so many of the veins were ligated apparently, of course I wasn't there so I can't tell how much was done, but the scar indicates a good deal of the vein, the superficial part of the saphenous vein was excised and since the most of the circulation to the leg comes from the femoral artery and vein and since the involved area was right over that, there must have been some interference with the femoral vein and its collateral circulation, so that even if the vein was completely closed you could gradually establish collateral circulation. I believe it depends on the location of the—

The Court (Interrupting): Are there any other questions now, Mr. Wertheimer?

Q. (By Mr. Wertheimer): Doctor, is it generally known that a fatty person is more susceptible to surgical infection than one that is not?

A. Well, fatty tissue doesn't have the resistance of muscle, of muscle for instance, so that particular type of tissue is more susceptible to infection, it doesn't have the resistance.

Q. Well, what I am getting at is Miss Canon weighed, I think, at the time of the operation 192 pounds, and a prudent surgeon would and should recognize that infection is more likely to spring up following an operation on such a [58] person than a person of average weight.

A. But that isn't a contra indication, I don't think, for surgery.

(Testimony of Dr. Raoul Esnard.)

Q. Not a contra indication for surgery, a lot of fat people have surgery but—

A. (Interrupting): It makes it more difficult.

Mr. Wertheimer: I think that is all at this time.

The Court: We will take a brief recess and then you may cross-examine.

(Short recess.)

Mr. Wertheimer: I think I have concluded my direct examination.

Mr. Deasy: Just a few questions, Doctor.

Cross-Examination

By Mr. Deasy:

Q. You have no personal knowledge of the condition of Miss Canon—of this infection of Miss Canon's prior to January, 1948? A. No.

Q. That is when you first observed her?

A. When I first saw her, January, 1948.

Q. And at that time the ulcerated area was confined to the right side of the abdomen, is that right?

A. The right side, yes.

Q. And there were no—there were no draining sinuses other than in the place you have indicated?

A. That is right.

Q. Nothing on the left side or—

A. (Interrupting): Well, there was this ulcer on the anterior surface of the left leg with the associated cellulitis which I don't think had any-

(Testimony of Dr. Raoul Esnard.)

thing to do with the, that phagodenic ulcer we are talking about. It was—

Q. (Interrupting): That was attributable to the phlebitis?

A. From the phlebitis, yes.

Q. Well, let me ask you this, when there is—when there is surgery performed such as a ligation of the veins for the reduction of—well, such as was performed in this case, would you anticipate that there is a likelihood, or is there a likelihood, of a phlebitis developing from surgery upon the veins and the blood vessels?

A. You actually produce a sterile phlebitis. I mean, you close off the vein. The vein then becomes plugged and a clot forms in it and it eventually atrophies. A thrombo-phlebitis is primarily on an inflammatory basis. You don't have—you have a little discomfort when a vein is tied off, but when you have this inflammatory process then you have considerable pain and considerable swelling. Of course there is some swelling in the ligation, that is why they put an Ace bandage on, to support the circulation until it is re-established.

Q. In a ligation such as was performed on Miss Canon in [60] this case in June of 1945, certain swelling and pain at the site of the operation is to be anticipated, isn't it?

A. Well, no—

Mr. Wertheimer (Interrupting): Just a moment, if it please the Court. The record in this

(Testimony of Dr. Raoul Esnard.)

case—the record of this case discloses this, your Honor: that there was pain immediately following the operation but the record does not disclose that following the operation there was swelling. Measurements were taken as will appear—

The Court (Interrupting): I don't think that Counsel was asking the question directed particularly to this operation. If I heard you correctly, he wants to know whether or not a ligation of this kind, whether it wasn't normal—whether it was or was not normal that there would be pain and swelling resulting.

Mr. Deasy: Yes, your Honor.

Mr. Wertheimer: Well, your Honor, I don't want the question to be misleading. I want the facts understood and what ranges the questions have to them.

The Court: I will allow that. It is proper cross-examination.

The Witness: With any incision into the skin, there is some pain and not necessarily swelling, but the pain is transitory. In a day or two you have just a little discomfort and no more. [61]

Q. (By Mr. Deasy): Now, with reference to an infection at the site of an operative wound, is it more likely, Doctor, an infection would develop shortly after the operation or after some period of time?

A. Well, it depends on the type of infection. The more virulent infections develop early and the

(Testimony of Dr. Raoul Esnard.)

less virulent ones develop quite late. The incubation period is longer in the less severe or less virulent ones so it would vary with the type you were dealing with.

Q. What I really had reference to was the likelihood of bacteria entering the wound to cause the infection. Is it more likely shortly after the operation than after the healing process has commenced, isn't that so?

A. Well, potentially the wound—if you are dealing with an infected wound, potentially it is infected from the time of the surgery, at the time that the bacteria are introduced in to the wound. The manifestation of that infection varies with the type of bacteria that you are dealing with. Is that clear, your Honor? Have I answered his question?

The Court: I think so. I don't know precisely, but the attorney will carry on.

Q. (By Mr. Deasy): You stated in your direct testimony as I gathered that it was your opinion as of now that the infection in this kind of case got in there to the wound at the time of the operation and not later? [62]

A. Well, that is a reasonable presumption.

Q. And you mean at the very moment of operation, is that right, or would you say within 24—

A. (Interrupting): Not at the moment, during the course of it, I beg your pardon.

Q. Would you say within 24 hours?

A. No, at the time of. I mean the operation may

(Testimony of Dr. Raoul Esnard.)

have taken a half to three-quarters of an hour. During that time. You see bacteria will develop latently. They don't come out of thin air. They have to get in there and begin to grow and multiply. It is their growth and multiplication that gives you the infection.

Q. I think that you stated that it would be necessary for them, for the bacteria, to appear in the wound, that they should come either from the blood stream or from the contact with some contaminated object.

A. Yes. Ordinarily suture material is a most common sort of wound infection.

The Court: You mean bandages?

The Witness: No, the material you use to tie off the blood vessels. It is—

The Court: You mean the gut or whatever is used?

The Witness: The gut or whatever was used.

Mr. Deasy: Gut was used in this case, your Honor.

The Witness: But I mean a pair of gloves that weren't [63] thoroughly sterilized. A surgeon might prick his finger—I mean prick his glove with a needle and if there were—was bacteria on the skin and it got on the needle, I mean there is an infinite number of ways.

The Court: Well, the doctor might be the most cautious and experienced doctor and still there might be infection?

(Testimony of Dr. Raoul Esnard.)

The Witness: Oh, sure, because he has to depend on the orderly that runs it, the autoclave in the dressing room or the sterilizing room and has to depend on the people who make the suture material and the catgut. In other words, the most cautious doctor might find himself confronted with infection if the people that manufacture the suture material have been careless in some way and there was no way of determining it, he couldn't tell.

The Court: So that there are innumerable ways in which in the course of an operation that infections could result, even in the case of the most prudent doctor?

The Witness: That is correct, it does happen in the case of most prudent doctors.

Q. (By Mr. Deasy): I was about to ask you, Doctor, if it isn't a fact that post-operative infections of one kind or another are not extremely rare?

A. Well, do you mean today or in the last 40 years?

Q. Well, I am not referring to 40 years ago, say within the [64] last five years.

A. They are certainly becoming less frequent and less severe.

Q. But here is the possibility after the operation of some infection developing, isn't that so?

A. Oh, sure.

Q. And no matter how cautious they are?

A. I personally routinely use a prophylactic

(Testimony of Dr. Raoul Esnard.)

penicillin with all of my cases immediately after surgery, just in case one little bug that might have gotten in don't get a chance to grow.

The Court: You mean you use it now?

A. I use it periodically and hypodermically 300,-000 units a day.

Q. (By Mr. Deasy): Now, as I understand it, in the case of Miss Canon here shortly after the operation, that is, within a day or so, she developed a pain at the site of the wound and that at the time the sutures were removed, which I understand from her testimony was about eight days after the operation, she observed an exudate of some kind on the bandage, and that the wound at that time appeared to be—to have opened somewhat?

A. A little opened.

Q. To have opened up? A. Yes.

Q. I am not quite clear as to whether that was before or [65] after the sutures were removed, but it was about that time she observed that?

A. Well, I of course wasn't there.

Q. Does the record show?

A. I was going to say presumably when the sutures were removed.

Q. Well, it opened up.

A. Yes, rarely does it occur before that. Sometimes, but they don't pull out so easily.

Q. Now, you stated that at that point, Doctor, it would have been good medical practice to have taken a culture of the materials which had exuded

(Testimony of Dr. Raoul Esnard.)
from the wound, the fluid which had exuded from
the wound. A. Yes.

Q. And that it was bad medical practice not to
take a culture of that exudate right away?

A. Yes.

Q. I think you also stated that both on the com-
plaint of pain by Miss Canon and the evidence she
was running a low fever, that it was good medical
practice to prescribe medication in the form of sul-
pha or penicillin or both? A. Yes.

Q. Now, isn't it a fact, Doctor, that among medi-
cal men there are two schools of thought on that
point? Many doctors practicing in the State of
California do not immediately [66] prescribe drugs,
but they use medication in the form of dressings
at the site of the wound?

A. Of course, I am prejudiced, your Honor. I
use it before they ever get an infection.

The Court: Would you know if there are two
schools of thought?

A. I haven't heard of the school that doesn't
take advantage of the antibiotics and the sulpha
drugs.

Q. (By Mr. Deasy): You personally in your
own practice prescribe the use of the drugs?

A. Penicillin.

Q. Yes. I think you stated that you used it.

A. Prophylactically.

Q. And practically automatically?

A. Prophylactically, that is right.

(Testimony of Dr. Raoul Esnard.)

Q. Now, would you say then that doctors who do not prescribe sulpha or the sulpha drugs or penicillin immediately upon a complaint of pain and the evidence of a low fever following an operation are not following good medical practice?

Mr. Wertheimer: I think there is another factor here, your Honor, and that is the exudation of the sanguinal serros material.

The Court: He is not talking about that now.

Q. (By Mr. Deasy): I am speaking of, Doctor, the first eight days. [67]

A. Within the first eight days, yes. It isn't good medical practice. During the first two days there is a differentiation between the temperature. That normally and quite frequently normally occurs following the surgery. The pain of the surgery and the actual trauma could cause pain, but when the temperature persists and the pain persists, then the presumption is that there is something abnormal there and the most reasonable explanation would be an infection, and if there is an infection then the patient should receive everything at our disposal to counteract the infection.

Q. It is true, is it not, Doctor, that there are many persons who are, well, you might call it allergic to the antibiotic drugs? A. Yes.

Q. And with such persons how could you determine whether or not a person were allergic to, say, penicillin or the sulpha drugs?

A. They usually develop a rash or they develop

(Testimony of Dr. Raoul Esnard.)

hives. They usually get a local reaction at the point of administration of the penicillin. They get an angella neurotic edema. They can't have asthma. They can develop that if it is due to an allergy, then they can develop any of the allergies from the penicillin.

Q. But it is good medical practice, I understand you to say, to administer those drugs and then determine after the [68] administration whether or not a person is?

A. It is the only way you can find out whether they are allergic to them.

Q. Unless of course, a doctor knows from the statement of the patient or from a previous experience that the patient is allergic to those drugs?

A. Oh, yes, I mean—but they have had at one time or another an opportunity to determine.

Q. Now, Doctor, if Miss Canon shortly after the operation had, say, within the first 24 hours, had handled the bandage at the site of the operative wound or touched the wound itself, could the infection which later developed be caused by that, assuming that she had handled the bandage or wound?

A. Of course, that would be one way of getting an infected wound.

Q. Or, assuming that some hours after the operation, that is, the evening of the day on which the operation was performed, she got out of bed and wandered about and left the ward and went

(Testimony of Dr. Raoul Esnard.)

outside the ward and walked about in the hospital premises and did such—would such activity have resulted in an infection getting into the wound?

A. No. We acknowledge that early ambulation is the very finest treatment for most of these cases of surgery, I mean, surgical—

Q. (Interrupting): I don't mean the walking around, I mean [69] the exposing of herself to the air outside of the ward.

A. It is the same air.

Q. You feel that the air is not one of the contaminating objects that you would get bacteria into the wound from, is that right?

A. Well, air is one of the sources of contamination, surely. Lister used to operate in the operating room with a fan on thinking that was the greatest source. It is considered very unlikely though because you see in the ordinary—the course of the ordinary operation, an instrument will be lying on the instrument table for several hours and no attention made to sterilize the air in the room. Bacteria conceivably could settle on an instrument, but I think there has been—

Q. (Interrupting): You feel it is very unlikely, is that what you mean? A. Yes.

Q. —that these bacteria would be air borne?

A. It is extremely unlikely. There is, of course, that possibility, but the fact that she left the yard, the confines of the yard, wouldn't be a factor particularly if the wound were dressed.

(Testimony of Dr. Raoul Esnard.)

Q. You are assuming that the bandage was properly attached to the wound and that would in itself keep any airborne infection from getting in?

A. That is right.

Q. I think you stated, Doctor, that at one time or another you took cultures from the present site of the ulcer and that as far as the cultures showed something which I tried to get and I think you spelled it, but you spelled it too fast. What was that?

A. Or not very well, perhaps. It was puyosziamious, p-u-y-o-s-z-i-a-m-i-o-s. Is that how I spelled it before? It is a type of infection that produces a green pus. I mean you can identify it purely by the appearance of the pus.

Q. Is that a separate organism or is that a type of staphylococcus or a streptococcus or what is it?

A. It is one of the stapho organisms. You see, auereus produces a whitish pus or in this particular strain a greenish pus.

Q. And that was found on the, more or less on the surface? A. Yes.

Q. And I think you said that the depths of the wound or in the depth of the ulcer there was an micro-aerophilic streptococcus infection?

A. Yes, we were able to isolate it.

Q. And now I believe you said that since you have been treating Miss Canon you have had occasion to excise the ulcerated area? A. Yes.

(Testimony of Dr. Raoul Esnard.)

Q. And that you have used the zinc peroxide treatment? [71] A. Yes.

Q. That is in the form of an irrigation, is it?

A. Yes, we use both a paste and an irrigation. We use a liquid and the paste.

Q. The paste is placed on the dressings and packed on the wound, is that it, or what?

A. When there is a sinus tract we introduce it catheters into the sinus tract and let it drip down into there in the liquid form.

Q. Is that the usual and proper treatment for a micro-aerophilic infection?

A. Well, Dr. Melony recommends it. It is such a rare infection that there is no usual and acceptable treatment.

Q. Is that Dr. Frank L. Melony of Columbia University? A. Yes.

Q. And is he an authority on ulcers, doctor?

A. He apparently was the one who first described this particular type.

Q. A phagogenic ulcer, you mean?

A. Yes. Or if he wasn't the first, he did a good job of describing it.

Q. And his recommendation for treatment is the use of zinc peroxide, is that right?

A. That is right.

Q. Now, I understood you to say, Doctor, that a future operation [72] was in order for Miss—for the treatment of Miss Canon?

A. That is right.

(Testimony of Dr. Raoul Esnard.)

Q. You hoped that the spread of the ulcer might be stopped?

A. With the last one, we, I think, accomplished more than in any of the previous surgeries. I hope to change technique sufficiently at this time so that we might be able to excise the involved area and get the primary union.

Q. The only thing that can be done is an excision of the areas, is that right?

A. Well, that is one of the accepted treatments.

Q. Apparently she has been—there has been many excisions performed upon this ulcer since the first?

A. Yes, before I took care of her.

Q. You found evidence on examination that several areas had been excised? A. Yes.

Q. Numerous areas? A. Yes, denuded.

Q. Wouldn't it be true, Doctor, that if and after numerous excisions were performed upon this ulcer and that it nevertheless continued to spread in the face of irrigations with zinc peroxide and dressings with zinc peroxide and dressings of medication by means of penicillin and streptomycin and sulfa drugs, and nevertheless it continued to spread, wouldn't that be an indication that the wound was being reinfected [73] from time to time and new infection, new bacteria were getting in there?

A. Well, not necessarily because it would be hard to conceive of it being reinfected time after

(Testimony of Dr. Raoul Esnard.)

time always with the same infection. The thing is so rare to begin with and then you reinfect it every time with this very rare organism, it just doesn't seem possible, plus, of course, the findings when you get in there and see a type of infection that she does have.

Q. The particular organism you were just referring to is the micro-aerophilic strep?

A. Yes, that one can be controlled fairly easily. We are using a penicillin powder on it.

Q. The staphylococci infections are rather easily controlled?

A. They are more easily controlled.

Mr. Deasy: No further questions.

Redirect Examination

By Mr. Wertheimer:

Q. Will you tell us how much the infection has spread since you have been treating Miss Canon, Doctor?

A. From just a little to the right of the midline over the remainder of the abdomen, it started to go down the left leg. We apparently have been able to check the progress down there. It extended into the back and by excising widely and doing a primary closure, we have gotten a healing of the [74] back but over the crest of the ilium she has an ulcer now that extends upward so that is the extent of it today.

Q. Is this phagogenic ulcer, Doctor, produced by

(Testimony of Dr. Raoul Esnard.)

the sinegesture or cooperative action of more than one bacteria?

A. Apparently. I don't know. I don't think anyone knows too much about this kind of a thing. I certainly don't know enough about it to cure her.

Q. By the way, did you ever render a bill to Miss Canon in this connection, Doctor?

A. No.

Q. What do you estimate the reasonable value of your services for the past year to be, for the purpose of this lawsuit?

A. I haven't figured it out, but on the basis of \$5 for hospital calls and perhaps \$150 for each surgery, it would amount to quite a considerable bill.

Q. Well, what is your best estimate as to the figure, what do you figure, \$150 for each of the ten operations, wasn't it?

A. Yes. I mean I haven't figured anything, but I mean estimating it at \$150 that would be \$1500 there, and then—

Q. (Interrupting): How many visits did you make daily?

A. Daily visits.

Q. Daily for over a year?

A. Yes. I may have missed two or three days.

Q. And then were these dressings you made rather complicated? [75]

A. Some of them, yes, sometimes they take—

Q. (Interrupting) What is your best estimate now as to what the reasonable value of the services you have rendered is?

(Testimony of Dr. Raoul Esnard.)

A. I think with the accepted charge for hospital calls, which is, in Los Angeles at the moment is, \$5—

Q. (Interrupting) Well, would you say \$3,000 is a conservative estimate of the value of your services for the past year for the operations and—

A. Yes, I would say that that would be a fair—

Q. (Interrupting) Operations, dressings and all of that. By the way, I have a bill here from the California Lutheran Hospital. You were familiar with the treatment that Miss Canon received at the hospital? A. Yes.

Q. And she has been under your care at that hospital this entire time, hasn't she?

A. Yes.

Q. I will show you this bill, Doctor, and as you if you are generally familiar with the contents of it and know whether or not she received the bill?

A. Yes.

Q. It is a total bill for \$8,000—\$8,055.79, which includes various medical supplies and so forth. Does that represent what she received at that hospital?

A. Yes. Of course, I can't guarantee it to the penny, but [76] certainly they have kept an accurate record of all medications.

Q. Does this bill represent a reasonable value for all of the services she received there?

(Testimony of Dr. Raoul Esnard.)

A. Yes.

Mr. Wertheimer: I would like to offer this in evidence. Any objection?

Mr. Deasy: No objection.

The Clerk: Exhibit 6.

Mr. Wertheimer: May I say this, your Honor, the Doctor has suggested to me this: The reason Miss Canon is sitting with her foot in the box there is that he recommended, the doctor recommended, Dr. Esnard recommended she keep her leg elevated. Now, he suggested to me that the best way for the Court as the tryer of the fact to understand the full extent of the injury, that Miss Canon received, is to have an examination made of Miss Canon. He is prepared to cooperate in that. I found out now that he plans to leave for Los Angeles. Does your Honor feel—

The Court: (Interrupting) I don't think there is any necessity for that. The Doctor has described these—his services and the nature of the operations and the condition of the plaintiff and I see no point in subjecting the plaintiff or the Court to the examination of the plaintiff.

Mr. Wertheimer: It is as you will. [77]

The Court: If there were some dispute as to the nature of the operations that had been performed, or the present or past condition of the plaintiff physically, if that issue were raised under such circumstances it might be conceivable that the Court would need to see an examination, but I can't

(Testimony of Dr. Raoul Esnard.)

see that there is any necessity for that in this case. Well, do you want to let the Doctor go back to Los Angeles now?

Mr. Wertheimer: That is all at this time. I want to check over my notes and maybe we will go a little bit further, but I don't think so.

The Court: I think you have probably pretty fully covered the ground. I guess the Doctor wants to go back to Los Angeles.

Mr. Deasy: I have no further questions.

The Court: Well, he may be excused unless you want him to stay. We will recess until two o'clock.

After Recess—2:00 P.M.

Mr. Wertheimer: If the Court please, Dr. Esnard has returned. But before going to Los Angeles, before he went, he undertook to change Miss Canon's dressing. She is supposed to be back here any moment. I thought that in the interim I would read to the Court from the exhibit some of [78] the excerpts I thought most significant from the DeWitt Hospital record.

The Court: This is a part of the Plaintiff's Exhibit 3, isn't it?

Mr. Wertheimer: I think that was the number.

The Clerk: That is correct, your Honor.

The Court: And you are now, what you are reading is the only part of the exhibit that is to be in evidence, or are you reading parts of the parts that are to be in evidence?

Mr. Wertheimer: That is right, part of the parts that will be in evidence. It would be a rather lengthy proceeding to read it all, but I think I can argue from those parts which I don't read from but which are in evidence.

The Court: Well, you can read whatever you think is necessary to be heard or that the Court will need to know in listening to the evidence in the case or anything else. Of course you can argue from it if you wish.

Mr. Wertheimer: The first entry I will read is DeWitt Hospital, referring to Myrtle Canon, date of admission, 13th of June, '45. Age 32. Race W.

This is a record that is signed by T. B. Massell, Captain M.C., and reads as follows:

"Final diagnosis varicose veins, great saphenous system, severe on left, moderate on right.

"2. Anxiety, hysteria, severe, chronic; additional diagnosis: One ligation of saphenous vein, 14 June 1948, anesthesia local novocain. Two ulcer phagocytic, left thigh, due to infection with micro-aerophilic streptococcus and staphylococcus aureus, secondary to operation one above.

3. Operation, debridement of infected wound, 13 July, 7 September, 3 October and 29 October, 1945."

This is a transfer summary, of Myrtle Canon under progress notes and was signed by the same man T. B. Massell:

"Transfer summary: 24 November 1945.

"Patient was admitted 13 June 1945 because of

varicose veins of the left leg with aching and mild edema of three years duration. There were also asymptomatic varicosities on the right. There was a history of superficial phlebitis in 1943 on the left. Physical examination revealed extreme degree of obesity, permanent varicosities along the saphenous vein of both extremities, more marked on the left, incompetent perforators were demonstrated on the left just above the knee and in the mid-calf. There is a past history of hysterical laryngospasm, a few months prior to admission.

"On the 14th of June ligation of the saphenous vein was performed at the sapheno-femoral junction and in the lower thigh. A large perforator was located and ligated in the mid-calf at the same time.

"Post operatively patient developed cellulitis of the operative wound in the upper thigh which became locally [80] necrotic and broke down. On the 13th of July wound was explored, indurated fat excised and a closure of the faschia and vein was done, leaving a drain in place.

"Healing failed to occur, infectious process continued to spread despite various local applications and the use of penicillin.

"On the 27th of August a micro-aerophilic hemolytic streptococcus was found in association with staph aureus and diphtheroids zinc peroxide was started locally but response was not too satisfactory. On the 10th of September culture showed pseudomonas aeurginosa and an aerobic nonhemo-

litic strep. She was given a course of streptomysin, had numerous excisions of the wound edges starting on the 17th of October, 1945, and continuing to the 27th of October, 1945. She was given 800,000 units of intra-muscularly and 60,000 units intravenously.

"At the start of the treatment the infection was apparently controlled but then after a few days began to extend again. Streptomysin treatment was discontinued and zinc peroxide was resumed on a daily basis, doing dressings under anesthesia.

"Wound gradually became clean and at the time of discharge there were only two small areas at the upper lateral edge in which were unhealthy granulations.

"Because of the closing of DeWitt General Hospital, [81] patient was transferred to a civilian institution. Throughout her stay she was very unstable emotionally, was generally uncooperative and at times seemed psychotic."

Here is a letter from Dr. Meleney to which reference was made numerous times, addressed to Major Norman E. Freeman under date of November 15, 1945 from Columbia University, College of Physicians and Surgeons, the Department of Surgery:

"Dear Norman:

I am sorry that my reply to your letter has been so long delayed.

You certainly have a very difficult problem on hand and have tried almost everything I can think of."

I am reading from a part of this, Mr. Deasy, and if you wish to read more it is up to you. I will read the parts I consider significant.

"The fact the patient has pain inside the abdomen would make me think that the infection had already spread up through the veins and lymphatics beyond all reach of any local medication. If it is in the lymph glands of the groin it will be necessary to excise them, and if they are at all enlarged I would advise this. I would also advise excision of the overhanging, undermining skin margins." [82]

Now, here is a record entitled Chief Complaint—Condition on Admission — Previous Personal History.

"Chief complaint, varicose veins. General appearance and condition on admission: well nourished, well developed individual who is cooperative and not acutely ill; occupation: medical secretary; propliteal service, none; habits, cigarettes—occasional, alcohol—occasional. Drugs, none."

Then there is some previous personal history. Operations, Appendectomy, Tonsilectomy. None of which is significant—it tells about the condition of her parents. Another physical examination dated—well, it is D. K. 6—June 14, Myrtle Canon, civilian employee, Ward 117; height 5 foot 7 inches, normal weight 150, present weight 192 pounds, skin—then there is a blank for skin indicating no comment.

Head, including special senses, nose, mouth, throat and pharynx: Eyes—pupils round and equal and react actively to light and accommodation.

(B) Nose—symmetrical, there is no nasal obstruction and no septal deviation.

The Court: What is the good of reading that to me, that has nothing to do with the case.

Mr. Wertheimer: That is right.

The lungs—the lungs expand equally at both bases. [83] The breath sounds are clear and no rales are heard. There are no areas of dullness.

Abdomen: no tenderness or rigidity—muscle tone is good; muscular system, there is no atrophy or weakness. The muscle tone is good.

Service system: The reflexes are equal, active and physiological.

The Court: Does it say anything about her leg there in that examination or about the varicose vein?

Mr. Wertheimer: Yes.

“Vascular system: There are rather prominent varicosities along the saphenous vein both lower extremities. These are most marked on the left side where there are saccular dilatations two just above the knee, and one in the medial side of the mid leg.

“There is also a tortuous vein running along the anterior aspect of the left thigh. On the right side the most prominent varicosities are on the posterior aspect of the right calf, extending downward across the medial side of the popliteal space.”

That is the part she pointed to.

“The tourniquet test revealed the presence of perforators on the left just above the knee and in the midcalf. On the right I am unable to demon-

strate any perforators below the saphenous-femoral junction. [84]

"Heart tones clear, no murmurs are heard."

The Court: There was something you read to me a while ago that said there was evidence of some phlebitis prior to that time. I was wondering whether that was part of this examination.

Mr. Wertheimer: No, I don't know what you are referring to.

The Court: You first read to me a document that had reference to that—it was a document that had to do with her admission to the hospital. I was wondering whether there was any comment on that subject in this examination you are reading from.

Mr. Wertheimer: "Chief complaint, condition on admission, previous personal history." There is nothing in that, sir, about any phlebitis. On Chief Complaint it is varicose veins and there is nothing in that that indicates any phlebitis.

The Court: I was wondering if there was anything in this examination record of an examination by the doctor that you are now reading from that referred to that subject.

Mr. Wertheimer: The part I think you are referring to is "patient was admitted 13 June, varicose vein left leg with aching and mild adema three years duration."

Mr. Deasy: The next sentence, Counsel.

Mr. Wertheimer: "There was also asymptomatic [85] varicosities on the right. There was a history of superficial phlebitis in 1943 on the left."

Patient first noticed——” This is part of the initial summary, working diagnosis, contemplated laboratory tests and consultations.

“Patient first noticed superficial varicosities on the calf of the right leg, posterior aspect, approximately three years ago. During the last year there has been an increase in the size of varicosities which have appeared on the anterior aspect, left thigh, popliteal space, left leg, and medial aspect of the left calf and the medial aspect of the right calf.

“There is also varicosities in the popliteal space in the right leg and thigh.

“Patient complains of mild swelling on the left ankle and aching of the left lower extremity. The right lower extremity is asymptomatic unless she is on her feet for a long period of time.

“Working diagnosis or impression: Varicose veins, both lower extremities.

“Contemplated laboratory tests and special examinations: CBC; Kahn; bleeding and clotting time; urinalysis.”

Now I come to the progress notes.

“Myrtle Canon.” The first entry is 14 June, 1945:

“Patient taken to surgery and ligation of the saphenous vein and in the sapheno-femoral junction, in the lower [86] thigh and in the midcalf, a large perforation being found in the latter portion and small perforators being found in the lower thigh.” Signed E. W. Rector, First Lieutenant.

"17 June, 1945: Patient has run a lowgrade fever since surgery and has had considerable pain and some tenderness in the left lower quadrant, the exact nature of which I am unable to determine." Signed E. W. Rector, First Lieutenant M.C.

"20 June, 1945: Temperature is 101 today. Patient has been listless, wandering about and quite irritable. Examination of the wound reveals no evidence of any infection at present. The tenderness in the lower left quadrant has completely subsided. I am unable to account for her fever. White count has been ordered. Signed E. W. Rector, First Lieutenant M.C.

"23 June, 1945:"

The Court: That was six days after the operation?

Mr. Wertheimer: Yes, your Honor.

"23 June, 1945:"—this would be nine—"Temperature is subsiding. Wound has opened superficially and is draining a moderate amount of sanguinoserous exudate. She is complaining of considerable pain in the entire lower left extremities are as follows:

"Thigh, six inches above knee, right 21 inches, left 20 and a half inches, calf six inches below knee, right [87] 14 and a half inches, left 14.

"I cannot see that the patient has any evidence of thrombosis of her deep veins and since there is no manipulation of the femoral vein, I see no rea-

son why she should have it but cannot account for her pain.

"25 June, 1945: Still complains of throbbing pain in the entire left lower extremity. Wound is not grossly infected but does not tend to heal properly.

"Measurements of the lower extremities are the same as of 23 June, 1945. She has been a febrile for the last four days. Signed E. W. Rector, First Lieutenant M.C."

Then there is a skip in the record here to the 8th of July at 10:00 a.m. signed by Rector reading as follows:

"8 July—"

I have looked for the intervening records. I can't find them. I don't know where they are.

"Patient remains afebrile. Wound continues to remain open and drain huge amounts of blood stained serum in spite of what dressings, irrigations, and leaving it alone.

"Blood sugar taken yesterday revealed—reported normal cultures and CBC also taken. This morning on getting up after breakfast patient became very dizzy and fell to floor striking left frontal region. Examination at present reveals small swelling in left frontal region. Cranial nerves all normal, no bleeding from ears, peripheral reflexes [88] and motor functions all intact.

"Blood pressure 155 over 90—pulse 88. I do not believe patient received any intra-cranial damage—" Signed Rector.

"13 July—Patient taken to surgery, wound re-explored under pentathol and entire edges of indurated fat excised. No FB found."—whatever that means—"No abscess, no hematoma. Fat and fascia closed with catgut. Drain brought out through stab wound.

"Patient started on penicillin surgery."

That is signed Rector.

Here are some letters I am skipping over. Here is—I think I brought out that Miss Canon paid for some of the drugs and her board bill. Here is a letter from Major Freeman to Mrs. William Tarbutton, Box 12, Desert Hot Springs, California.

"Thank you for your letter—"

Mr. Deasy: Counsel, I thought that these letters were no part of the offer of the exhibit here.

Mr. Wertheimer: Well, to some extent that is true. Is there any dispute that Miss Canon—Miss Canon shall testify to the bill, took care of her board bill, paid some of her board bills and streptomycin and penicillin. She is not a free patient, in other words.

Mr. Deasy: I think she can testify to that herself. [89]

The Court: Yes.

Mr. Wertheimer: I won't read all of this. I will read the parts I consider significant.

Here is the streptomycin therapy case report. Let us see, in October they began the streptomycin treatment. This is a report dated 27 October, '45, De-Witt General Hospital, Auburn, California.

"Responsible Officer, M. E. Freeman, Vascular Surgery Section. Name of patient, Canon, Myrtle A. Diagnosis: Phagodenic ulcer of left groin. Symbiotic ulcer—undermining ulcer. Phagodenic ulcer of left groin. Date of onset, 17 June, 1945. Date of beginning of streptomycin therapy, 17 October, 1945.

"Bacteriology, (blank); blood, (blank); urine, (blank); wound, one, hemolytic strep (micro-aerophilic) two pseudomonas aerogenosa and three non-hemolytic strep (micro-aerophilic)." Then there is some material here on the sensitivity of the organism to streptomycin which I am unable to interpret.

"Complications due to drug, none; result at site of treatment, infection was apparently controlled for several days but then extension reoccurred.

"Sensitivity of organisms to streptomycine disappeared. Treatment failed. Norman E. Freeman."

This is the temperature chart while she was being [90] streptomycin.

"Case summary: Patient is a 32-year-old obese single white medical stenographer employed in Vascular Surgical Section at this hospital. On 14 June, 1945, a left—" a word I can't read—"saphenous vein ligation was performed in the operating room. Immediately after operation she ran a low-grade fever with excessive pain localized to the left lower quadrant and her wound.

"9 days post-operative the wound started to drain

large quantities of sero sanguinous material and eventually broke down completely.

"Fever was never marked but complaints of pain and tenderness were all out of proportion to the apparent seriousness of the condition. All types of local therapy unavailing. One month post-op exploration of wound was negative. Excision of skin edges with secondary suture—penicillin—unsuccessful. Culture staph aureus, blood chemistry normal. Try Vitamin C—Protein feeding—transfusions unavailing. By 7 September, '45, micro-aerophilic streps and staph aureus at last culture from wound so cautery excision and zinc peroxide occlusive dressing used. Spread continued despite zinc oxide—sulphonamides and penicillin with result:—"That must mean without result.

"The transfusions, ulceration clean and healing in center but spreading at upper edge. [91]

"17 October—streptomycin started with immediate improvement in comfort and rapidity of advancement. However, this continued for only 7 days when signs of recurrence were apparent. Although culture revealed disappearance of pseudomonas, the micro-aerophilic streptococcus was still present though"—a word I can't read—"on culture.

"27 October. Streptomycin treatment stopped."

Now then this report continues:

"Possibly heavier dosage of streptomycin at the start combined with zinc peroxide occlusive dressing locally might have checked the infection.—"

Mr. Deasy: I move to strike that out, that last

part, your Honor. It appears under the title "Comments" and criticism and suggestions.

The Court: Who signed this?

Mr. Wertheimer: Well, this is part of the record under entire—entitled Case Summary. It is unsigned. Do you have one that is signed?

Mr. Deasy: It isn't signed.

Mr. Wertheimer: I think it is a comment on the record. I don't think it is proper so we will strike that.

The Court: Yes, I think that should go out. That is somebody's comment.

Mr. Deasy: It is speculative in the first place.

The Court: It is retrospectively made concerning [92] something that might have occurred if a different method were used.

Mr. Wertheimer: It is made by people under whose charge she apparently was, your Honor, and it is an entry that comes close to being a description of the fact. In other words, on effort within—

Mr. Deasy: I think it is pure speculation of a circumstance that possibly if something had happened, something might have happened.

The Court: Yes, that may be stricken.

Mr. Wertheimer: Here is a removal of some dressing and the progress notes—

"20 July, 1945: Patient has been complaining of pain about her wound, especially in the region where the drain was brought out. There is some induration in this region. There is steady profuse

serros drainage. Culture showed a staph-aureus which is sensitive to penicillin. Suggest daily irrigation of wound with penicillin solution, one to 500.”

That was the 20th of July, 1945, and signed N. E. Freeman, Major.

“21 July, 1945: The drain has been removed. Wound has again opened and again has indurated”—a word, I can’t make that out—something “surfaces. Wound being irrigated with penicillin as suggested above by Major Freeman. [93]

“Patient started on parenteral with about 300”—something—“daily. Her pain is at times all out of proportion to appearance of wound. I cannot believe that it is real.” That is signed by Rector.

“27 July 1945: The wound is still draining profusely. Suggest insertion of sponge soaked with azochloramid 3 times daily with parenteral penicillin. Signed Norman E. Freeman, Major.”

“3 August 1945: The wound is still draining profusely. I wonder if dietary restriction which has now put her weight down to 180 pounds may be associated with hypoproteinemia. Suggest serum determination. Norman E. Freeman, Major.”

There is a record here of a dressing performed by Major Freeman on the 14th of October 1945 which I won’t read the details of.

Then the progress notes skip back a little bit and here on the 18th of July and signed by Dr. Rector is:

“Patient remains afebril. Wound looks O.K.

Pain has been much less. Penicillin to be stopped.
Rector."

I think it will appear later that the first penicillin that was given was on the 4th of July and the first sulpha drug on the 27th of August. The 21st of July:

"Wound is again separating and draining serum. Patient getting 300 mgs. of parenteral Vitamin C per day— [94] Signed Rector."

The 27th of July:

"Wound has broken down completely. Lower flap considerably indurated. To start hot compresses later Dakinization to be started. Patient has been getting penicillin past four days. Rector.

"10 August 1945. The serum protein determinations are at a normal level. The patient feels a great deal better although there is still copious drainage. Signed Freeman.

"15 August: Wound still wide open. The interior flap is under dissected as far as I can reach with gloved finger. Wound still exudes dark blood clots continually. Signed Rector.

"22 August: Status of wound still the same—wound edge biopsied and set for anaerobic culture. Sinear for amoeba negative. Wound packed with zinc peroxide. Patient still continues to be a tough nursing problem.

"24 August 1945: There is considerable sanguinous discharge from the wound. Suggest complete blood studies. Norman E. Freeman."

I will cut this as short as I can.

"Patient started on pencillin and sulfadiazine, Rector.

"23 August:" it says here, "Packing wound with zinc peroxide daily. Rector." [95]

"27 August: Patient shows marked anaemia. To have transfusion. Sulfadiazine used.

"29 August: Patient given 500 cc's of blood. Tissue culture reveals anaerobic staph. Wound is being packed daily with zinc peroxide. Rector."

The 31st of August, 1945: "Have now packed wound with zinc peroxide daily for a week. I believe it has shown some definite improvement though there is still considerable sloughing fat from the interior flap. There are two packets dissecting down the leg through the fat, one laterally, one medially. I am attempting to get the zinc peroxide packing down into these. Believe patient should be given another course of penicillin along with the zinc peroxide if no decided improvement within another week the wound should be laid wide open with the cautery and possibly excised."

Then there is another one I have difficulty reading, but it doesn't appear significant.

"August 31: Patient still continues to be temperamentally unstable. Today I gave her codeine grains"—so many—"nembutal solution one hour before the dressing which yesterday allowed her to sleep through the entire dressing. Today I could not arouse her to get her to turn over either verbally or by trying to turn her. However, when the nurse said something regarding the compresses for

her post"—something or other—"she awoke and started throwing [96] objects and making derogatory remarks at the nurse as though she had actually been awake through the whole procedure. I am sure there was no justification for her exhibition of temper. She flew into a rage which was almost uncontrollable. Signed Rector.

"7 September 1945: The fact that there has been continued breaking down of tissue, which involves even the skin flap is in harmony with the diagnosis of phagodenic ulceration associated with symbiotic infection of streptococcus and staphylococcus. Lt. Rector is going to open the wound up this afternoon and I believe that this saucerization should be performed. She should have at least three transfusions of blood today. Signed Norman Freeman.

"7 September: Patient taken to surgery and wound excised with cautery. Signed Rector.

"10 September: 300 cc's transfusion—Rector.

The 11th of September: "Wound being irrigated and dressed with zinc peroxide.

"22nd of September: Have been continuing to redress wound with zinc peroxide treatment. The wound has had a clean granulating base throughout. There is still considerable tenderness in the skin and subcutaneous tissue distal to the wound, however there is no cellulitis or induration present." He refers to three transfusions she had.

"2nd of October: Another area of necrosis has developed [97] in the interior flap and one on lateral

side of wound in last 48 hours. These areas will have to be excised. Rector.

"3 October: Interior flaps with tract and area of necrosis on lateral subcutaneous tissue excised with cautery. Wound cauterized and saucerized and dressed with zinc peroxide. Rector.

August the 31st—well, that refers to the patient's temper and so forth.

September 6, 1945: "1200 cc transfusion. Wound being dressed daily and packed with zinc peroxide. However there are too many dissecting packets in the site and I believe it should be laid wide open and partially excised. Rector.

"September 7, 1945: Patient taken to surgery and all crypts of wound opened and then most of anterior flap consisting of fat and skin, the large—the former largely necrotic was excised. Signed Rector.

"17 October 1945: At dressing today the patient volunteered the information that she had had the most comfortable sleep since she had been ill. This is only 12 hours after starting the streptomycin. She climbed by herself from the guerney to the operating table without protest."

The Court: (Interrupting) Mr. Wertheimer, I don't want to interrupt you but you are getting many months after the operation. Can't you make just a brief statement as to what that is about, because that doesn't enter into any [98] of your claim here, does it?

Mr. Wertheimer: To this extent in part, of

course, from the fact there is an injury and by this part her injury is severe and it also shows the treatment she got. There are significant entries to it, for instance, the lack of pus. Some of the characteristics of this ulcer is homogenic. Lack of induration of the arteries and all of those things I think will have some place finally in the argument of the case.

The Court: Well, you are 'way up now to October.

Mr. Wertheimer: Yes. I will skip this then. This (indicating) is from the treatment of the 13th of June:

"CBC, Kahn and bleeding and clotting time—" I don't want to repeat now on the treatment record, which incidentally skips around to September and October. I am turning over the pages of treatment to the latter dates, your Honor. Unfortunately they are not in order.

The Court: You are not really complaining about the later treatments. That is part of your case, I take it, as to the great suffering and pain?

Mr. Wertheimer: That is right.

The Court: And all the matters that go up and that are natural right up to the present time including what the doctor said on the stand this morning.

Mr. Wertheimer: I think once they made up their [99] minds to do something they did everything in their power.

The Court: I think that probably the United States Attorney would not protest against your

statement as to the severity of the—the duration of the pain and suffering endured by all of these operations that have taken place during the last year or two.

I think that you could submit that on the record itself. That phase of the matter. Would that be the case?

Mr. Deasy: I am anticipating that the lady will testify herself on those subjects.

Mr. Wertheimer: The record will corroborate her.

The Court: The record is there now and can be referred to. I am taking it for granted that Counsel has made a correct statement of the many operations and the pain and suffering and all of the difficulties, the present difficulties that the lady has. I think that will be borne out by the testimony of the doctor that has already testified. I don't think you need to dilate upon that because the record you have there, plus the testimony of the doctors—the doctor that has testified of course and what the lady may have to say herself would be—

Mr. Wertheimer: I think that is true. I have to, however go through the record to bring out—

The Court: (Interrupting) Of course the crux of the matter is whether or not there was any malpractice at the [100] time of the operation or immediately subsequent.

Mr. Wertheimer: That is correct.

The Court: That is the only issue in the case, because whatever happened afterwards is something

that happened and continued on and resulted in all of these various operations.

Mr. Wertheimer: Yes.

The Court: And no matter how aggravated in need or how horrible that situation may have been is itself not of any importance in determining the question of whether or not there was a cause of action based on that.

Mr. Wertheimer: That is true.

The Court: That goes to the element of damage.

Mr. Wertheimer: Exactly. There are things in the latter record though that I have called to your Honor's attention now to indicate such things as this: That there was no infection at the time of the operation and when the first—I have called your Honor's attention to the first entry in the record concerning the administration of penicillin and concerning the administration of one of the sulpha drugs and items like that. That is the reason I am trying to go through this as fast as possible.

Now, another thing there is nowhere in this record whatsoever, and I think it is significant, and I suppose the only way I could prove it would be by reading the whole thing, but I will make the statement and if Mr. Deasy wants [101] to have the complete then—nowhere in the entire hospital record of any of the people observing her and treating her was there any statement that she was causing this infection herself.

Now, here is a radiologists record taken on June 1945 with respect to the varicose veins which I

think indicates there was no phlebitis before. They have all pointed to that. I don't think there was and I think the record is clear on that but I might explore it.

A phlebogram of the left lower extremity by injection of a superficial vessel at the ankle, visualizes what is thought to be an adequate deep venous circulation about the lower leg and calf region, however, the outline is lost at the proximal end of the tibia. On the firm of the upper leg the popliteal vessel and the femoral are outlined well and would substantiate adequate deep venous circulation in the calf region. Again visualized is a tremendously dilated long saphenous system with large tortuous vessels in the thigh region. Though faint, it is believed that the outlines are sufficient for adequate deep venous drainage in event of tying off varicosities about the calf and thigh regions. It is signed Rector. There is, on number 84 is a clotting time. I can't read them, but the clotting time is five minutes 45 seconds and the bleeding time is two minutes. The red blood count is 3,710,000, and the white blood count is 5,900, [102] just before the operation, which indicates that there was no evidence of any infection on that point and the urinalysis taken on June 13th, 1945 shows the same.

Here is the operation report of the first operation by Rector which I read to your Honor.

The Court: I beg your pardon?

Mr. Wertheimer: This is the operation report of the operation for the vein or veins on the 14th

of June, 1945. It is in the record. Do you want me to read it at this point? I don't think it has any significance.

The Court: That is up to you to decide. I can't tell.

Mr. Wertheimer: All right. Post operative diagnosis: "Bilateral varicose veins."

The Court: Read it if you think it is of any importance.

Mr. Wertheimer: All right. "Post operative diagnosis: Bilateral varicose veins. There is no indication of any phlebitis at that time after the operation. Operation left high saphenous and low saphenous ligations.

"Remarks: After infiltrating the left groin with novocain the sapheno-femoral junction was exposed through a transverse incision paralleling and just below poupart's ligament. Several tributaries of the saphenous vein at the sapheno-femoral junction were then divided between clamps and ligated after which the saphenous vein was divided between [103] clamps and doubly ligated on both ends. No sclerosing solution was injected into the vein. Upon further exploring the femoral vein at the sapheno-femoral junction, a large tributary on the medial side of the femoral was found, possibly the deep medial femoral circumflex, and this was also divided and ligated. The wound was then closed with interrupted cotton sutures, and a second incision made on the saphenous vein just above the knee. Here two small perforators were found and both these

divided and ligated, as well as ligating the main saphenous vein. A large dilated varicosity was found in this area.

"A third incision was then made at about the junction of the middle and lower one-third of the leg over the saphenous vein, and at this point a very large perforator could be seen entering it from the deep fascia. First the saphenous vein and the perforator were ligated between clamps. Pressure dressings were applied and the patient returned to ward."

Then follows some operation reports, one dated the 15th of July—"Postoperative diagnosis: Granulating wound with that necrosis. Operation: excision of wound." The operator was Dr. N. E. Freeman, assistant Dr. Rector and the description of what was done was then given.

On the 7th of September 1945 an operation report, "Postoperative diagnosis: Anaerobic staph injection of [104] previous wound for ligation of external saphenous vein on left thigh. Operation: excision of wound."

This is September 7th. "Remarks: After the area was prepared, the various recesses and under-dissected pockets of the wound were explored and laid open with a bovie unit. These were found to extend down the anterior surface of the leg for about three inches and down the anterior medial surface for about three inches and up onto the monsdengres. The lining of the pockets of these recesses were found to consist of indurate thick

yellow looking necrotic, subcutaneous fat, which apparently harbored the infection. The base of the wound did not look so bad and yet had considerable amount of indurated necrotic fat."

Another operation on the 3rd of October. "Post-operative diagnosis: Phagodenic ulcer, secondary to wound of left side for ligation of saphenous vein. A previous excision had failed to control the infection. This left the would entirely saucerized without any overhanging flaps.

The 29th of October, 1945, a dressing with zinc peroxide. Temperature treatment beginning the 13th of June. On the 14th of June they show a temperature of 99 in the morning and 99.4 in the afternoon. Under medication and nurse's notes the main entries are codeine and sodium luminal and the like.

On the 15th of June the temperature in the morning [105] was 99 and 99.4 in the afternoon, and later 99.8. Sodium luminal given and codeine. Patient's temperature on the 16th of June was 100.06 in the morning and 99.4 in the evening.

99.4 throughout; there are complaints on the 16th of June, complaints of some left groin pain and nausea. Earlier dressing and codeine for pain.

Now on the 17th of June in the a.m. the temperature was 100.4 and later in the day 101.2. It shows that the dressing is changed and Ace bandage re-applied.

The Court: What was the day of operation?
The 14th?

Mr. Wertheimer: Yes, your Honor.

On the 18th of June temperature 100.8. On the 19th of June no temperature. The reading is still complaining.

On the 20th of June the p.m. temperature is 101. None of these entries—I won't read all they have as to medication and nurse's notes until I come to something significant.

As far as the number of the drugs that were given, they were spoken of this morning. The 20th of June, a 98.6 temperature.

Routine care, some bleeding. Patient crying, codeine for pain.

The 22nd of June, routine care. Temperature on the 23rd 98. On the 27th of June routine care. Moderately large amount of bloody drainage. Temperature throughout this period normal.

The 29th of June, bleeding profuse tonight. Codeine [106] and then we come to July.

Complaining of pain, frequently hysterical.

Here is the first entry with respect to any of the antibiotics. The 4th of July, temperature 97.4. Routine care. In the morning condition seems better—mental condition seems better. Dressings changed. Penicillin pack in wound, states lower leg feels very good. That is the 4th of July.

The 8th of July, dressing changed. Large amount of drainage of blood stained serros. Temperature 98.6. Dressings and penicillin were given around the 9th, the 10th and the 14th of July. I am not reading them all to save time.

The 24th of July, penicillin. Routine care, copious amount of four smelling drainage. I skipped a lot of this.

On the 7th of August, crying; the 8th of August, routine care; 8th of August, dressing changed, bloody, luminal.

Going through these in September very rapidly to save time, September and August. Here is an entry on the 26th of August, your Honor. The first I have been able to find.

No. 144, Mr. Deasy.

Sulphadiozine. It describes the dosage which I am unable to read. That is the 26th of August, sulphadiozine. There are others, but I won't read them in the files.

There are several pre-operative examinations and anesthesia records that were made at the time by Dr. Rector, and changing her bandages and cutting away the edges of the [107] wound sometime in November and in October.

There are numerous pre-operative examinations and anesthetic records. I haven't counted the number of them. They deal with the change of dressings and under anesthetic.

The Court: Counsel, I don't wish to appear to be complaining, but this is a part of the preparation work of attorneys. This has been going on now for an hour while you examine these documents and pick out these things. Now, that is work that should be done before the trial of the case. I have lots of cases waiting for trial here, and I don't wish to be

critical, but this takes up too much time for you to do your studying now. You are examining these documents. They were here and you could have examined them and picked out what you wanted before.

Mr. Wertheimer: Well, they have been examined by me, your Honor, a dozen times prior to trial, but they are in the custody of the Court, and I have to go through these again and again and pick out what I consider significant. I picked out those that I recognize from having gone through before and having something of significance. I am not culling these for the first time.

Here is the pathological report of the pathological examination of the tissue dated July 13, 1945. That was the date, you remember, of the first operation that followed the one on the 14th of June. Dated July 14. [108]

“Gross: Received a large regular mass of predominantly fatty tissue”—of a certain size—“which on section is a tubular structure having a small central lumen completely occluded by dark grayish—brown material. The large mass, on section, shows a considerable amount of fat with fibrous tissue around the periphery and contains numerous grayish brown degenerated mottled areas.

“Microscopic: Section through the fatty mass shows a good deal of necrosis of fat and soft tissue as well as an acute and chronic inflammatory reaction with some fatty fibrosis. Involved in this mass is a small lymphnode which also shows evi-

dence of chronic inflammatory changes, resulting in some fibrosis of the strona, distortion of the follicular structure and some reticulo—endothelial hyperplasia. Section through the blood vessel shows what is probably a thickened slightly fibrotic wall of the vein which is completely occluded by a well organized thrombos. The initial layer of the blood vessel is quite thickened and has a hyaline appearance. Diagnosis: 1. Phlebo-sclerosis and thrombosis, 2. cellulitis, acute and chronic with necrosis and, 3. fat necrosis."

That is a July report.

The debridement, the operation on the 17th of August, 1945, shows a diagnosis of—

The Court: Why don't you put your client on the [109] stand. She left her seat in here in the court room. She is obviously getting tired while you read all of this. This could be handled in some other way it seems to me.

Mr. Wertheimer: Well, the records in this case are relatively lengthy. I don't propose to do the same with the records of the DeWitt Hospital. I don't know how else to get them before your Honor. It is either a question of your Honor reading those parts that are significant, or my calling them to your Honor's attention.

The Court: I can't see where all of these records of the various operations that took place afterwards have got anything to do with the claim of malpractice.

Mr. Wertheimer: Well, your Honor, I certainly

had to read the temperature chart and I have to show your Honor that the first culture that was taken was taken on the 6th of 7th of July.

Now, you asked me what was the significance of the tissue examination. It is most significant that the tissue—that the pathological examination of tissue made on the 13th of July shows a chronic inflammatory condition of considerable—that existed a considerable length of time, and that even Dr. Rector admits, the infection started shortly after surgery.

Now, I can't argue my case, your Honor, as I go along very well, but on the other hand I can't dump these in [110] your Honor's lap. I have culled these records a dozen times and I know what is significant and I must read those things so that when I later in argument refer to them the significance will appear. I have only myself to criticize if the thing is onerous and tedious, but I have no other way of doing it.

I am not going to read them, but here are blood transfusion records showing, as I recall, during the time she was there apparently 20 transfusions. I will satisfy myself with that statement.

Now, here is, your Honor, one reason that I am forced to read these laboratory reports and that is this:

Upon examination and investigation into the case, some of the doctors claimed that there was no such bug and she never in fact had it. It may seem strange to your Honor, but I think there may be

testimony in this case that some of the doctors were unable to isolate it. That is the reason they charge her with self-injury.

Now, the only way I know to prove that, your Honor—

The Court: (Interrupting) But there isn't any evidence of any self-injury in the case. You are just anticipating something. The United States Attorney made a statement that there might be, but that there will be any evidence on that—maybe there will be—but you needn't anticipate it until it is—there is evidence on that score. [112] That is unnecessary.

Mr. Wertheimer: Maybe—

The Court: (Interrupting) Isn't that right, Counsel? You are anticipating.

Mr. Wertheimer: I suppose that is true, your Honor. It might appear I am a little bit, and it might save time in the long run. Here is the laboratory report of October 19, 1945 showing a hemolytic strep, micro-aerophilic pseudomonas non-hemolytic strep, but it is a laboratory report of the DeWitt Hospital.

And then there is a laboratory report on the 27th showing the same. There are other laboratory reports but in accordance with your Honor—

Now, here is the first culture, your Honor, that appears to have been taken by process, judging by the fact that there are no other cultures from the date of the operation until this one of the wound. It is dated July 14, 1945.

There is an earlier one; it is dated July 7, 1945. That was the first culture that was taken of the specimen which was the drainage from the wound and it reports no organism seen, that means it is visible to the naked eye.

I think that is all I have at the present time. Do you want to proceed or take a short recess?

The Court: We will take a recess and then proceed with your client. [113]

(Short recess.)

(After recess.)

Mr. Wertheimer: Miss Canon, will you take the stand?

Thereafter,

MYRTLE CANON

previously sworn, testified as follows:

Direct Examination (Continued)

By Mr. Wertheimer:

Q. Miss Canon, while you were in the hospital at DeWitt, did you pay any of your bills?

A. Yes. Civilians when they go in has—

The Court: No, just answer the question yes or no.

A. Yes, I did.

Q. (By Mr. Wertheimer): Did you pay—I will show you here some receipts, what are those for, penicillin?

A. Those are receipts for penicillin I paid.

(Testimony of Myrtle Canon.)

Q. Did you pay for all the penicillin?

A. No, I paid for it for a while until I ran out of money and then they paid for it.

Q. Do you have any recollection of the total amount you paid for penicillin?

A. No, I didn't.

Q. Did you pay for your subsistence while you were in the hospital? [114] A. Yes.

Q. Do you have any recollection of how much?

A. I don't know what the total was. I paid \$1 a day.

Q. \$1 a day subsistence for every day you were there? A. Every day you were a patient.

Q. Your best recollection is you paid that?

A. Yes, I paid it.

Mr. Wertheimer: I would like to offer all of these.

Q. Are these all receipts, all of the receipts you have for the penicillin? A. I think so.

Mr. Wertheimer: I would like, if the Court please, to offer as plaintiff's exhibit next in order these receipts for the penicillin payments.

The Clerk: No. 7.

Mr. Wertheimer: And then I have—

Q. Will you tell me what that is? Is that a receipt for your subsistence?

A. That is a receipt for subsistence.

Q. Do you have any more receipts?

A. I think I have some more, some more at home.

(Testimony of Myrtle Canon.)

Q. Some more at home, you didn't bring them with you? A. Not today.

Q. You mean you have them in the hotel?

A. They are in the hotel. I believe I do. I wouldn't swear [115] I do, but it seems to me—

Mr. Wertheimer: Would you stipulate she paid her subsistence bill while she was in the hospital?

Mr. Deasy: Well, I will object to the offer of those bills on the ground they are incompetent, irrelevant and immaterial unless you can establish that she wasn't paying subsistence before this operation while living there at the hospital. I don't see how they would flow from the operation that she paid for her meals.

Q. (By Mr. Wertheimer): Were you paying for your subsistence before you went into the hospital? A. Yes, because I lived on the Post.

Q. I see. Then you continued to pay, is that right? A. That is right.

Q. At the same rate?

A. Well, they put you on a different—I think you are a different status when you are a patient. I don't remember, but I think it is more.

Mr. Wertheimer: Well, I will offer, if the Court please, this receipt. I may have occasion to offer others later showing Miss Canon while she was in the hospital paid this on account of her subsistence.

Mr. Deasy: I object to it on the grounds stated. I can't see its materiality.

The Court: I don't see the materiality of it. The

(Testimony of Myrtle Canon.)

plaintiff was a civilian employee of the Army. She paid a certain amount per day for subsistence while she was living there on the post, and she said she continued to pay that while she was in the hospital.

Mr. Wertheimer: All right.

The Court: I can't see that it has any bearing on the case.

Q. (By Mr. Wertheimer): Do you recall whether there were any other drugs you paid for, Miss Canon?

A. I was asked to pay \$200 for streptomycin. I didn't have the \$200. They wired my family, my mother sent a money order for \$35 to Major Freeman and she said they would send more later. When I was discharged from the hospital Major Freeman gave that \$35 back to me so apparently they never used it. They asked me to sign—

Q. (Interrupting) Well, that is—what were you going to say?

A. I was going to say they asked me to sign a statement saying that I didn't have the \$200 to pay for the streptomycin which I did.

Q. Now, what—did you receive any treatment in the hospital in addition to those of which there is some evidence in the record, that is, zinc peroxide, zinc peroxide dressing and streptomycin, before the debridement operations?

A. Before the surgery, you mean? [117]

Q. No, I mean did you receive any treatment at all while you were there in addition—after the

(Testimony of Myrtle Canon.)

surgery of June 14? A. After surgery?

Q. Yes.

A. Not for the—not for the first. Well, as I recall it wasn't until around the 13th of July that, after that second operation that they began giving me penicillin and stuff.

Q. Yes. Well, what I was getting at was this: Did you have your dressings changed in surgery while you were there?

A. Oh, in surgery, yes. Four weeks I had them done under an anesthesia every day in surgery.

Q. Do you know how long a period that was for?

A. Oh, I would say four weeks, offhand.

Q. And who did that, Dr. Rector or Major Freeman?

A. Major Freeman did it because Dr. Rector was a patient in the hospital for a while and this Captain Maselle did it later.

Q. Now, when did you leave the DeWitt Hospital?

A. As I recall it, October 29, 1945—no, November, pardon me, 29, 1945.

Q. And where you removed to?

A. I was removed to the University of California Hospital here in San Francisco.

Q. How did you get from Auburn down to San Francisco?

A. I was taken by Army ambulance to Sacramento and then [118] brought from Sacramento

(Testimony of Myrtle Canon.)
in a Red Cross ambulance. Army nurses accompanied me to Sacramento.

Q. You were—then you went out to the University of California Hospital on Parnassus and Second Avenue? A. That is right.

Q. Was your wound dressed at that time? What dressing did you have on?

A. When I left DeWitt?

Q. Yes.

The Court: What is the pertinency of this?

Mr. Wertheimer: Well, I have got to show the treatment at the University of California, and I want to show the condition she was in when she got there, your Honor. She came there by ambulance. The wound was still dressed and she was still suffering from the same ailment. I am going to try to be as brief as I can about the treatment at the University of California Hospital, but I assume——

The Court: I could understand that if there was such an issue here, of how the wound was dressed at the time she got to the University of California. What is the importance of that? You bring in so many details that it is hard for me. You dig into it and throw all of this material out of a basket and get in the issues of the case those matters that don't seem to me to have any importance. Even how she was transported, what has that got to do with it? [119]

Mr. Wertheimer: We will make it as—telescope it as much as I can, your Honor, and still cover

(Testimony of Myrtle Canon.)

the treatment. There is four years' treatment I have got to cover here.

The Court: I will grant that you can get in the trial that she got to the University of California and then take her on from there and find out what happened to her there.

Q. (By Mr. Wertheimer): You arrived at the University of California Hospital. Now, can you tell us what the treatment was that you received there as well as you can recall?

A. I arrived there on a Saturday. Monday I had a skin graft and then, approximately—oh, I forget, but as well as I can remember it was about two or three weeks later the infection apparently became very active again.

Q. Where was the skin graft you said you had done?

A. On the wound on the thigh that had been excised in the Army. That had granulated up and they skin grafted it.

Q. I see. And then you were in bed, not ambulatory, were you? A. That is right.

Q. And then what is the next treatment you received?

A. The next treatment was, I would say, approximately six weeks later when Major Freeman came down. He recognized the infection was acting up again and I was taken to surgery that night for an apparent excision or opening of just the sinus tract, but when they got in there the whole

(Testimony of Myrtle Canon.)

left side [120] was involved and they did a radical saucerization of the left side.

Q. Now, the left side, what do you mean, the leg?

A. Left abdomen; no, no, not the leg, the abdomen. It had extended up underneath into the abdomen.

Q. Into the abdomen?

A. That is right.

Q. And that was the area that was excised this first operation? A. That is right.

Q. What treatment did you receive in the intervening six weeks' period, just bed rest, is that all? You stayed in bed?

A. I stayed in bed and they irrigated the graft area with a penicillin solution.

Q. Any other treatment?

A. Oh, as I remember just routine.

Q. Routine care. Now, following the operation on the left, up to the left side, did you have any —what treatment did you receive following that?

A. They went back to zinc peroxide dressings at the request of Major Freeman and blood transfusions.

Q. You were receiving blood transfusions?

A. And following that it kept persisting and I just had numerous excisions just one right after the other.

Q. What area did those incisions cover? [121]

A. Well, in time it involved the whole abdomi-

(Testimony of Myrtle Canon.)

nal wall back into my back on the left side and went down the left thigh again in one area—in two areas it just kept breaking out and breaking out and breaking out.

Q. And were the excisions bigger there?

A. Yes, that is right. They had excisions and finally they had to excise part of the pelvic bone.

Q. Part of the pelvic bone?

A. Part of the pelvic bone.

Q. You mean the infection extended back to your left pelvis, is that right?

A. It was way back into the back and up into here (indicating). They had to take part of the bone. I had numerous skin grafts. I can't tell you the exact number because I was too sick and I was going to surgery too often.

Q. Do you have any knowledge of, while you were at the University of California Hospital, how many operations you had?

A. I wouldn't want to give you a statement because I can't tell you exactly.

Q. Not exactly?

A. There were too many. As I said, I was going to surgery very often.

Q. Well, the records are here. What other treatment did you receive at the University of California?

A. Oh, I had lots of penicillin and I had streptomycin and [122] I had furacin, which is a topical application of the drug.

(Testimony of Myrtle Canon.)

The Court: The records of the University of California Hospital are here, aren't they?

Mr. Wertheimer: Yes, your Honor, but even I quell at that. I saw them for the first time yesterday when they were brought into Court, and they are twice as thick as the government record. I am trying to get as much as I can from her.

The Court: Well, they probably—the examination will show all of these things.

Mr. Wertheimer: I don't think there will be any question about it.

The Court: I think that you are all right here without having to go through all that medical history that the University of California Hospital—it must be all in these records.

Mr. Wertheimer: The alternative I have is this, your Honor. I haven't seen the records. I can go through them and then summarize them or I can while she is on the stand give as pithy a summary as I can on the treatment there.

The Court: Wouldn't it be fair if I were to ask the witness a general question that might cover it?

During the time you were in the University of California Hospital, you had a large number of operations one after the other in which this abscess was being pursued by the [123] doctors to where it developed it was excised. That you had skin grafts and you had blood transfusions and you were almost constantly in bed during that period of time?

(Testimony of Myrtle Canon.)

A. Yes, I was.

The Court: Would that be a correct statement?

A. Yes, that is right. As you say, I just had numerous operations and skin grafts and blood transfusions. I couldn't tell you the number because there were too many, but I do know that they gave me all kinds of streptomycin.

The Court: And during all of this time you were bedridden most of the time?

A. I was only up about—about two weeks up and down at U.C. I was in bed practically the whole time.

The Court: And during that time you had great pain and discomfort all of the time and you were under opiates, were you?

A. Yes, most of the time. I had a special nurse for quite some time over there.

Mr. Wertheimer: Now, when did you leave the University of California Hospital?

A. I think it was October 5, 1940—Let's see, where am I?—6?

Q. 1946 in October. And where did you go then? A. San Francisco County.

Q. San Francisco County. Didn't they first—you had been [124] hysterical on many occasions, hadn't you, at the University of California Hospital? A. Yes.

Q. And been a difficult person?

A. That is right.

Q. And didn't they first move you to Ward—

(Testimony of Myrtle Canon.)

the Psychopathic Ward at the—withdraw that. I mean at San Francisco, the City and County Hospital? A. Yes, they did.

Q. And then you were examined by doctors there who immediately said what you needed was treatment for your infection, isn't that right?

A. That is right.

Q. And you were taken from there to the General Wards of the Hospital and given treatment?

A. That is right, and emergency surgery there.

Q. And you had emergency there. Now, did you have numerous operations while you were at the San Francisco Hospitals?

A. Yes, I did.

Q. Do you recall that?

A. Yes, and a lot of blood transfusions.

Q. Lots of blood transfusions.

The Court: How long was the plaintiff in the San Francisco Hospital? [125]

Mr. Wertheimer: About a year.

The Witness: About a year.

Q. (By Mr. Wertheimer): Now, while you were in the San Francisco Hospital they put you in Ward 42 on more than one occasion, didn't they? A. Yes.

Q. When you became particularly obstreperous?

A. Yes.

Q. And sometimes you threw things at the nurses, didn't you? A. Yes.

Q. Now, let me ask you this: Did they, while

(Testimony of Myrtle Canon.)

you were at the San Francisco Hospital, put you in a cast?

A. They certainly did. They put me in three of them.

Q. All right now, and tell us—the first cast—what was the first cast they put you in, when was it, do you remember? If you can, approximately.

A. I think it was about early June.

Q. Early June?

A. And I would say from my armpits below my knees.

Q. From your armpits to below your knees. How long did you stay in that cast?

A. I would say about six weeks.

Q. And then was that cast removed?

A. That cast was removed because I complained of pain so much underneath and I lost so much weight that they took [126] me out of it. The whole body was burned from the drainage of the exudate from the wound. I had lost about 30 pounds while I was in the thing. The same day they put me in the second cast.

Q. You mean right after six weeks in that cast they put you in another cast?

A. The same day, the same day they put me in another cast from my neck. Pulled my legs apart as far as they could, put a binding between my knees, and I was left in that cast for six weeks—no three and a half months in that cast. I complained of pain in my abdomen and back and

(Testimony of Myrtle Canon.)

under my arms and I was generally just absolutely miserable. It was during that period that I was thrown in "Psyc," and as I say when they took—finally I did get very sick and I apparently very anaemic. They took me out of that cast and when they took me out my whole leg was burned from the exudate and my body was—my cast was full of live maggots.

Q. How do you know that, did you see them?

A. I saw them.

Q. Were you receiving things for your pain, opiates during this time?

A. No. When I was in the cast they told me the pain was in my head. For a while they gave me red sleeping tablets but finally they wouldn't even give me an aspirin tablet.

Q. I see. Now, after the second cast was removed, were [127] you put in the third cast?

A. It seems to me I was taken from the cast that was filled with the maggots and I was put in a similar cast of the same type above my elbows, from my neck to above my elbows to below my knees with my legs separated.

Q. And how long were you in that cast

A. I was in that cast about seven weeks that I recall, and then transferred to Los Angeles County.

Q. Then the total amount of time you were in a cast was—let's see, the first was how long? Three months, is that what you said?

(Testimony of Myrtle Canon.)

A. Six weeks.

The Court: Are you going to go all over that? It is already in the record.

Q. (By Mr. Wertheimer): You were put in these casts and you were told you were put in these casts because you were told it was suspected you were tampering with your wound and opening the wound yourself, is that right?

A. That is right.

Q. Now, while you were in these casts, was it possible to do—first of all, let me ask you this question: While you were at the University of California Hospital, did you attempt to go under your bandage and tamper with the wound?

A. I certainly did not.

Q. Now, while you were at the University, the San Francisco [128] City and County of San Francisco Hospital, and before you were in the cast, did you attempt to get into your wound?

A. No. I certainly did not. As a matter of fact, I had experienced nurses all of the time, three shifts and my hands were kept in restraint and besides, the only time they took one hand out was when the nurse was in the room. The infection spread very rapidly in spite of that.

Q. Now, was it possible while you were in the casts for you to open the wound?

A. No, it was clear up to my neck.

Q. Did you attempt to do so?

A. No.

Q. Now, did you have more operations of the

(Testimony of Myrtle Canon.)

same kind at the San Francisco City and County Hospital?

A. Before I was put in the casts I did. They did the same kind of operation that they had at U.C.

Q. And then after that they left it alone?

A. After that they left it alone.

Q. And figured it would heal by itself?

A. Yes.

Q. Let me ask you this, Miss Canon: Mr. Deasy has seen this. This is the bill which you received from the City and County of San Francisco?

A. That is right.

Mr. Wertheimer: I would like to offer this bill if [129] the Court please, from the City of San Francisco to Miss Canon for the period October 5, 1946, to October 28, 1947, in the total sum of \$4,660, which includes 388 days at 9 plus a day and specialty nurse, 540, and blood transfusions 500. Do you have any objection?

Mr. Deasy: No.

Mr. Wertheimer: Will you stipulate that that represents the reasonable value of the services, Mr. Deasy?

Mr. Deasy: Well, I think it does, yes.

Mr. Wertheimer: All right, thank you.

The Clerk: That is exhibit 8.

Q. (By Mr. Wertheimer): And then you were moved down to Los Angeles about what time?

A. That was October 28, 1947.

(Testimony of Myrtle Canon.)

Q. And were you moved—were you in a cast at that time?

A. I was still in the cast. I was moved in the cast.

Q. I take it you got down there and you went—you were in a cast and taken to the train in an ambulance and so forth? A. That is right.

Q. And to the hospital. Now, you went to the County Hospital down at Los Angeles, is that correct, first? A. That is correct.

Q. And how long were you there?

A. I was there—

Q. (Interrupting): 'Til the first of— [130]

A. (Interrupting): Until the early part of January.

Q. January 12, 1948, is that right? From October— A. That is right.

Q. —29,— A. That is right.

Q. —a total of 75 days you were in the skin ward, is that right? A. That is right.

Q. Now, did they remove the cast down at Los Angeles?

A. They removed it immediately as soon as I got there.

Q. And what was the condition of your body at that time?

A. My whole abdomen was ulcerated from drainage. This leg, it was ulcerated on top. Apparently this one place down here had healed but the abdomen wasn't healed.

(Testimony of Myrtle Canon.)

Q. The abdomen wasn't healed. What evidence was there it was ulcerated?

A. Superficial ulcer. There were sores all over me from drainage.

Q. Sores from drainage? A. Yes.

Q. Anything else that you can—

A. (Interrupting): No, only this area over my abdomen was very, very tender. I didn't look real close at it but—

Q. (Interrupting): You had a lot of skin grafts?

A. There was a lot of scar tissue.

Q. Now, did you have any surgery at Los Angeles? [131]

A. I had practically no treatment at Los Angeles County. I didn't have—I didn't even have a blood count down there.

Q. Did you have any transfusions?

A. I had no transfusions whatever.

Q. What treatment did they give you down there?

A. I did most of my own treatment. As a matter of fact, they just give you local ointments to put on. Only I did get more—on my leg they did give me heparin and bicumeral, anti-coagulates.

Q. And did you have to do your own dressings?

A. I did my own dressings. I just put—you put your own compresses on and do your own dressing. The dressing nurses pass out the dressing and the ward doctor sees you occasionally. You are seen

(Testimony of Myrtle Canon.)

by the Chief of Staff about once a week down there, but actually your daily dressing, most patients do their own on that ward. I don't know anything about the rest of them.

Q. This is the bill you received from the Los Angeles County Hospital, 75 days at 5.46, a total of \$409.50? A. Yes.

Q. That is 5.46 a day. I will offer this as our next exhibit in evidence. There is no question but what that represents the reasonable value.

Mr. Deasy: It seems to be more reasonable than the San Francisco Hospital. [132]

Mr. Wertheimer: They did a lot less for her—

The Witness: That is for sure.

Mr. Wertheimer: Or to her.

The Court: How much is that?

The Clerk: 409.50. That is Exhibit 9.

Q. (By Mr. Wertheimer): Now, before—then you left the Los Angeles Hospital?

A. They discharged me.

Q. They discharged you, and how long did you—when did you enter the California Lutheran Hospital?

A. The 31st of January, 1948; I went to Dr. Esnard on the 29th.

Q. And the date of your discharge at the Los Angeles Hospital was—do you remember when it was?

A. The date of my discharge from where?

Q. Los Angeles, was the 12th of January?

(Testimony of Myrtle Canon.)

A. The 12th of January I went to my aunt.

Q. So within a week you went to Dr. Esnard?

A. It was within a week. I apparently had a cloth on my leg when I was discharged.

Q. You went to him. Were you still ulcerous at that time? A. That is right.

Q. Now, at the California Lutheran Hospital, what—can you tell briefly what treatments you received?

The Court: Didn't Dr. Esnard pretty well cover that?

Mr. Wertheimer: I beg your pardon; he did, your Honor. [133]

Mr. Deasy: I think he covered it, your Honor.

Mr. Wertheimer: I think he pretty well did.

The Court: I don't think you need bother the plaintiff with that. He told us just what he did, isn't that right?

The Witness: That is right.

Mr. Wertheimer: I think that is all now, your Honor.

The Court: Have you any more witnesses, Mr. Wertheimer?

Mr. Wertheimer: No.

The Court: I am just trying to find out, as far as—you will have some cross-examination, will you?

Mr. Deasy: Yes, your Honor. If that could wait until the morning I would appreciate it.

The Court: Have you attempted to produce any witnesses tomorrow?

Mr. Deasy: As I explained to the Court, I am unable to get my witnesses here for tomorrow in view of the fact that there is a convention of some sort here, or a convention of surgeons which they are all attending.

The Court: Who are you going to produce as witnesses? In order to get a continuance, you will have to make some statement to me as to whom your witnesses are and what they are going to testify to.

Mr. Deasy: Yes, your Honor. I can do that. The first is Dr. Freeman, Major Freeman. [134]

The Court: Perhaps it might be well for you to conclude the cross-examination first and then plaintiff rests before you make this application, but inasmuch as you want to defer the cross-examination until tomorrow, why you might as well hear this matter as if the plaintiff's case were concluded unless Counsel has an objection.

Mr. Wertheimer: I have no objection, your Honor.

Mr. Deasy: That is Major Norman Freeman—Dr. Norman Freeman who, your Honor appreciates from the testimony here, took part—

The Court: He was the doctor in charge.

Mr. Deasy: He was in charge at DeWitt, and Dr. Leon Goldman is attached to the University of California Hospital and is also the, I think, Chief of Surgery of San Francisco, the City and County

of San Francisco Hospital, who was in charge of the treatment of Miss Canon at that institution while she was there, and Dr. Paul Gleeby, who was also on the staff of the San Francisco City and County Hospital and who was also associated with the treatment afforded by that hospital to Miss Canon.

The Court: Where is Dr. Freeman, is he in San Francisco?

Mr. Deasy: He is; yes, your Honor. He lives in Marin County but he is in San Francisco. These doctors, I understand, are all in San Francisco at the present time but—— [135]

The Court: Why don't you just subpoena Dr. Freeman to come here tomorrow morning if you—so we can conclude this case? If he is here and the other two doctors, they have no testimony to give that would have any bearing on this malpractice unless you are using them as experts.

Mr. Deasy: It was my intention to use them as experts, your Honor, in line with the defense which I outlined in my opening statement which I made at the beginning of the case.

The Court: Is Dr. Freeman still acting with the government or is he in private practice?

Mr. Deasy: He is in private practice, your Honor. These doctors are all in private practice. He has been discharged from the Army, although I think he does some consultations.

The Court: We could dispose of him. Dr. Freeman wouldn't take too long. I think you better

have him here tomorrow morning. Send the Marshal over with a subpoena for him. I know the doctors are busy and I know they have conventions, but we just got to conclude lawsuits, we just can't continue them indefinitely.

Mr. Deasy: Well, I will attempt to have him here tomorrow.

The Court: Of course there is that important legal question that will have to be determined at the end of the plaintiff's case. [136]

Mr. Deasy: There are certain motions.

The Court: Whether or not the plaintiff—the question we have already discussed, the question as to whether there is any evidence of malpractice.

Mr. Deasy: I intend to make a motion in that respect at the conclusion of the case, your Honor. I felt very seriously that in this case that there might not be the necessity for having these doctors all here and I didn't want to put them under subpoena.

The Court: Perhaps in the desire to save time and save everyone's convenience, perhaps we are proceeding more rapidly than we should. I think perhaps the matter better wait until tomorrow when you conclude your examination and the plaintiff's case is finished. You can make your motions and we will then determine the motions and determine whether or not to issue the subpoenas for the doctors. I think that would be the best thing.

Mr. Wertheimer: That is all right with me. Are you calling Dr. Rector?

Mr. Deasy: No, I don't intend to call Dr. Rector.

Mr. Wertheimer: I don't intend to call him.

Mr. Deasy: I don't think it is important. We have his deposition which either one of us could use. He lives in Sacramento which is approximately 100 miles away. I think we might take—read the deposition. [137]

The Court: Well, I think probably we had better let you go today. We will reconvene tomorrow morning at ten o'clock.

(Thereafter, a continuance was taken until Thursday, March 24, 1949, at 10:00 a.m.) [138]

Thursday, March 24, 1949, 10:00 a.m.

The Clerk: Canon versus the United States.

Mr. Wertheimer: Ready.

Mr. Deasy: Ready, your Honor.

Mr. Wertheimer: Do you want her to take the stand?

Mr. Deasy: Yes.

Thereafter,

MYRTLE CANON

previously sworn, resumed

Cross-Examination

By Mr. Deasy:

Q. Miss Canon, I think you said yesterday you are 35 at the present time, is that right?

A. I am 36.

Q. You are 36. You were 32 at the time of this

(Testimony of Myrtle Canon.)

operation, is that right? A. That is right.

Q. Previous to—previous going into service of the Army at the Tormey Hospital, you had been residing in Southern California, is that right?

A. Yes, I resided there in Southern California.

Q. And I think you said you graduated from High School down there about 19—what was it? 1931? A. Santa Monica Hospital, 1931.

Q. And while you were going to High School there were you [139] living with your folks there, your family there?

A. My family lived there. I worked my way through school, but my family lived down there.

Q. Do you have a number of brothers and sisters?

A. I have three sisters and one brother.

Q. You have three sisters and one brother. Now, you mentioned yesterday working for a number of different doctors in Santa Monica and Los Angeles. Was that while you were going to High School or after you graduated from High School?

A. I was working at Dr. Koski's during the time I was going to High School and afterwards.

Q. You worked for the doctors both during your school time and afterward? A. Yes, sir.

Q. And the course you took was a business course, you didn't study nursing?

A. No, sir, I was taking up pre-nursing and a business course.

Q. Pre-nursing?

A. Pre-nursing.

(Testimony of Myrtle Canon.)

Q. When did you first become interested in medical matters and becoming a nurse?

A. Well, from early childhood. My mother is a nurse and my aunt is a nurse and I have always been around medicine.

Q. You have been interested in it then since early childhood?

A. Almost as long as I can remember. [140]

Q. —In medicine? A. Yes, sir.

Q. And I think you said that when you worked for these various doctors in Santa Monica and Los Angeles you assisted them in changing dressings on patients, is that right?

A. Yes, and also when I worked for the plastic surgeon which I mentioned, I scrubbed for surgery in his office.

Q. You assisted him in other surgical procedures, did you? A. Yes.

Q. And during that period of time you observed quite a number of patients' dressings and assisted in dressing a number of wounds on different patients? A. Yes, sir.

Q. And during those periods of time when you were working for these doctors, did you keep the records in the doctors' offices of the treatment he gave to patients that came in while you were working there?

A. Most of the time that wasn't under the scope of my duties because they had full time secretaries. I assisted the nurses most of the time.

(Testimony of Myrtle Canon.)

Q. And you also, I believe, testified yesterday that you worked in several hospitals in Southern California before you went to the Tormey Hospital at Palm Springs. You assisted in surgery at those hospitals, is that correct?

A. I didn't assist in surgery. I was a surgical technician [141] actually at California Hospital. I worked as an undergraduate nurse at the Culver City Hospital, but I didn't handle medications because I wasn't an R.N., but I did routine care, baths and that sort of thing.

Q. What is a surgical technician, what do you do as a surgical technician?

A. You take care of instruments in surgery, that is autoclave. You set up the surgery, that is as far as—you don't actually set out the sterile instruments, the nurses do that, but you do supplies and that sort of thing, making up the various packs.

Q. And you liked this work, didn't you?

A. Yes, I did, very much.

Q. And would you say that some of the work you did for these doctors in these hospitals would ordinarily have been done by registered nurses if it were not for a shortage in nurses?

A. Yes, sir. As a matter of fact, during the war there was a shortage of nurses. Since the war now the work that I did is being done by graduate nurses. I was the only person at California Hospital that was allowed to do instruments. I learned

(Testimony of Myrtle Canon.)

all of the names of the instruments, their uses, and watched them being used by surgeons.

Q. And you got that opportunity to do that because there was a shortage of R.N.'s?

A. ——And then because my work was highly recommended. [142]

Q. And you found this, the work that you did, such as assisting these doctors and in changing dressings yourself for the doctors quite fascinating, didn't you?

A. Yes. I observed and assisted in changing the dressings. I didn't change the dressings under my own supervision, I mean myself. It was always under supervision.

Mr. Wertheimer: Miss Canon, may I make the suggestion so that in the course of this trial if Mr. Deasy asks you a question, you answer the question and don't volunteer, please.

Mr. Deasy: Well, perhaps the question I asked wasn't quite in accordance with the facts.

Q. In other words, you yourself didn't do the whole job? A. That is right.

Q. ——For the doctor, but you helped doctors?

A. That is right.

Q. And you were present and you observed while they were doing the changing of the dressings?

A. Yes, sir.

Q. And you found that very interesting and highly fascinating? A. Yes, sir.

Q. Did you become interested in the progress of

(Testimony of Myrtle Canon.)

particular cases of particular patients in which you were assisting the doctor? I mean, you were interested in following up the case?

A. Yes, I was interested in all phases, yes. [143]

Q. And did you discuss these cases with the doctor for whom you were working?

A. No, sir.

Q. You handled the instruments in the doctors' offices and in these hospitals where you worked?

A. Yes, it was my job.

Q. And you became familiar with the names and the uses of the different instruments?

A. Yes, sir.

Q. And I assume that you were, of necessity, familiar with the fact that the dressings and instruments had to be sterile at all times? A. Yes.

Q. You learned, didn't you, that an infection might well result if the wound came in contact with some object which wasn't sterile?

A. Yes, sir.

Q. I mean the doctors impressed that on you, didn't they? A. Yes, sir.

Q. Now, during the time you worked for these doctors in the hospitals in Southern California, and during the time you worked at Tormey in the hospital at Palm Springs, and at the DeWitt Hospital, you always tried to do your work as conscientiously as possible, isn't that right? A. Yes, sir. [144]

Q. And as a matter of fact, you were willing to work extra time to finish the job that was at hand?

(Testimony of Myrtle Canon.)

A. I always did.

Q. And you always had a strong feeling of loyalty to the person for whom you were working, isn't that so?

A. Yes, I did. I got along well with all of them.

Q. And you always felt badly when you had to leave, for one reason or the other you had to leave the employment of any of these doctors, isn't that right? A. Yes.

Mr. Wertheimer: Well, I object to that question, your Honor. I don't think it is competent. It is incompetent, irrelevant and immaterial.

The Court: I don't see the materiality of that.

Q. (By Mr. Deasy): Now, going back to the time when you first went to work for the Army at the Tormey Hospital, when was that?

A. December 1943.

Q. 1943?

A. Late December or early January. I believe it was December.

Q. Well, it was about the end of 1943 or the beginning of 1944? A. That is right.

Q. And at that time were you in good health?

A. Excellent health. [145]

Q. And up until—prior to that date had you ever had surgical attention? A. Yes.

Q. And what was that for?

A. I had an appendectomy in 1928 and I had an injury to my hand in 1931.

Q. I didn't hear that answer.

(Testimony of Myrtle Canon.)

A. I said I had an appendectomy in 1928 and I had an injury to my hand in 1931 which necessitated surgical treatment.

Q. You got some foreign bodies imbedded, some glass or something imbedded in the hand, isn't that right? A. Yes, sir.

Q. While you were working at Tormey Hospital, you were ill on a couple of occasions, weren't you?

A. Yes.

Q. You had some difficulty in breathing and at one time that required your hospitalization?

A. Yes.

Q. Did you have a tonsilectomy performed at the Tormey Hospital?

A. I had a tonsilectomy performed at the California Hospital.

Q. Was that before you went to work for Tormey? A. Yes, sir.

Q. In September of 1944 you were working at Tormey Hospital, isn't that right, in September of 1944? [146] A. September of 1944, yes.

Q. You had taken sick there at that time?

A. That is right.

Q. With difficulty in breathing, and they had to put you in an oxygen tent? A. Yes, sir.

Q. You were then discharged to go home, isn't that right? A. Yes, sir.

Q. Then when did you first go to the DeWitt Hospital to work? A. Late October.

Q. 1944? A. 1944.

(Testimony of Myrtle Canon.)

Q. Then you were only home with your mother—

A. I was only home for a couple of weeks.

Q. —for a short time?

A. Just a couple of weeks.

Q. Now, after the operation, the vein ligation in June of 1945 at the DeWitt Hospital, that was on the 14th, wasn't it, of June? A. That is right.

Q. When did you first get out of bed after the operation? A. I don't remember.

Q. Was it within a day or two—wasn't it?

A. A couple of days.

Q. They let you up? A. That is right.

Q. During the period from the date of the operation and the [147] time you were transferred to the University of California Hospital, you weren't in bed all of the time, were you?

A. No, I was ambulatory part of the time.

Q. You were up and about quite a bit at the time? A. Yes.

Q. And on occasions you bathed yourself, didn't you? A. Yes.

Q. And during that period you didn't remain on the ward all of the time? A. No, sir.

Q. You went outside of the ward?

A. I was allowed to.

Q. You went to the portions of the building which were used for civilian personnel?

A. Yes, sir.

Q. And to the P.X.? A. That is right.

(Testimony of Myrtle Canon.)

Q. Is the P.X. located in the hospital building there?

A. Yes, it is right in the hospital building.

Q. Now, isn't it a fact, Miss Canon, that during the period between the time of the operation and the time that you left the DeWitt Hospital you handled the dressings of your wound repeatedly, isn't that true? A. No, sir.

Q. And isn't it true that during that period of time you [148] frequently argued with the nurses and objected to their changing the dressings?

A. I argued with the nurses, I admit.

Q. With reference to the changing of dressings?

A. I don't remember what it was about but I remember I did have some arguments with them.

Q. Didn't you feel during the time you were there at the DeWitt Hospital, Miss Canon, after the operation, that the nurses weren't properly attending to their duties in taking care of you from time to time? A. At times, yes.

Q. And didn't the nurses tell you from time to time while you were there that you were not to touch the bandages and that you were not to touch the wound? A. Yes. I never did.

Q. Didn't they tell you not to?

A. Yes, sir.

Q. And didn't they accuse you?

A. (Interrupting) They tell every patient that.

Q. And didn't they accuse you of doing it?

A. Yes, they did.

(Testimony of Myrtle Canon.)

Q. ——On several occasions?

A. Yes, they did.

Q. Now, during the time you were at the University of California Hospital, during that period of time, did you touch [149] the wound or interfere with the dressings at any time?

A. No, sir, I never did.

Q. And during the time you were at the San Francisco Hospital or any of these other institutions, did you touch the wound or handle the dressing? A. I never have.

Q. Didn't the people at the University of California Hospital, accuse you of handling the dressings? A. They did.

Q. And at the same hospital, the San Francisco Hospital they put you in a cast?

A. That is right.

Q. And they told you that the cast was to keep you from handling the wound, isn't that right?

A. That is right.

Q. And that is the reason—they told you that is the reason they had to put these three casts one after another on you, is that so? A. Yes.

Mr. Deasy: No further questions.

Mr. Wertheimer: Just a minute. I don't think I have any more questions, your Honor. I guess I don't have any questions, your Honor.

Mr. Deasy: There are some portions of the hospital records, your Honor, that the—of the records

which were Plaintiff's Exhibit 3 that I would like to read to the Court. [150]

Mr. Wertheimer: Well, that is in connection with the cross-examination of Miss Canon, is it? I am a little unfamiliar with this procedure, your Honor. Is Mr. Deasy now putting in his case?

Mr. Deasy: No, I am not putting in my case, Mr. Wertheimer. Reading portions of the record—

The Court: I don't think you need to do that. Whatever privilege one Counsel has, of course the opponent has the right to continue. It is a portion of the record.

Mr. Wertheimer: I am the last to dispute that, your Honor. If that is done, then I think Mr. Deasy is proceeding to put in his case. I mean, he has finished his cross-examination.

The Court: I think he may, in connection with the examination and testimony of the plaintiff, call attention to any of the hospital records and the subject matter of the matters that were subject to the cross-examination.

Mr. Wertheimer: I certainly think that is not proper.

Mr. Deasy: That is what I have in mind, to call the Court's attention to certain portions of the exhibit which is in evidence.

The Court: Very well.

Mr. Deasy: Rather than asking the lady about it. Isn't this—rather than point them out to her, I just want to point them out to the Court. [151]

Mr. Wertheimer: I wish to say I have no ob-

jection to Mr. Deasy doing that, but I wish to say this to the Court: Either it is an argument or else Mr. Deasy is now putting in his case and I will warn that it will be my position if he does so that any motion similar to the—like a nonsuit, and all the rest are unavailable to him when he starts to put in his own evidence.

The Court: Well, I will allow counsel—

Mr. Deasy: I had in mind, your Honor, conserving time and the fact—

The Court: I think the procedure is perfectly proper.

Mr. Deasy: I can ask the lady or I can point those out to Miss Canon and say that "Isn't it a fact that on a certain date you did so and so"?

The Court: It has been already asked and that has been admitted in evidence as a Plaintiff's exhibit, and of course Counsel has the right—

Mr. Wertheimer: I don't dispute that, your Honor.

The Court: —has a right to do it without putting in his own case. It is part of your case and he can call attention to such matters as he wishes to.

Mr. Wertheimer: Just so long as my objection is clear that is all.

The Court: Very well, go ahead.

Mr. Deasy: I have another copy of this record, your [152] Honor. I don't know if they are in the same order. These pages are numbered after a fashion. I took my copy, which is a certified copy, home last night and went through it very carefully

so that I could read without taking too much time the portions I wanted to point out to the Court. If there is any objection to my reading from the—from my own copy, I will offer it in evidence.

The Court: You might give—let Counsel follow you on the other and then there wouldn't be any question.

Mr. Deasy: The thing I had in mind is they may not be in the same order. I don't want to fumble through that when I can save time in here.

Mr. Wertheimer: I have no objection to Mr. Deasy doing that. My suggestion is he show me the courtesy that I may have overlooked when I was reading it. In other words, referring to the paper.

Mr. Deasy: My intention is to show things the plaintiff did. I haven't got a page number for counsel to follow. The record shows that the operation took place on January 14, 1945.

Mr. Wertheimer: June the 14th.

Mr. Deasy: Pardon me, June the 14th, 1945.

Now, I am referring at first, Counsel, to a page which is numbered 94. There are two sheets numbered there.

Mr. Wertheimer: That confuses me. [153]

Mr. Deasy: This is it.

Mr. Wertheimer: I think I have it.

Mr. Deasy: This is the nurses' chart immediately following the operation. The entries on January 15 indicate that—

Mr. Wertheimer: June the 15th.

Mr. Deasy: Pardon me. I can't read my own

writing. June the 15th indicate that the lady was up, that she was walking or attempting to walk on that date. I am referring to the time as June 15 at 10:45 when she was given medication for pain following first attempt to walk. That was one day following the operation.

Mr. Wertheimer: May I suggest this is very brief, Mr. Deasy. You read precisely what he says instead of paraphrasing.

Mr. Deasy: Well, it says:

"ASAGR-10." I can't read that stuff. It says: "For pain following first attempt to walk." That is the item I am calling attention to. Then on page 95 under date of June 18 there is the entry "Up and to BR—" which I assume is the bathroom—"with ease. Now has Ace bandage reapplied. Appetite good. Patient disturbed over being moved out of private room. Fussed and cried. Found on Ward 118. Returned to ward by night supervisor. Left back door towards Officers' Club—" that is on the 18th, four days after the operation. On page 97 there is an entry under June 23 that she— [154] showing that she was up and to the bathroom and that on the same page under date of June 24 there is an entry that she refused to have saline packs until after the doctor had seen her on June 26.

Mr. Wertheimer: Excuse me, Mr. Deasy. You said on June 23rd there was an entry.

Mr. Deasy: June 24, Counsel, it says routine care.

Mr. Wertheimer: I see. All right.

Mr. Deasy: "Refused to have saline packs until seen by Lt. Rector." I am reading these to show, your Honor, the lady wasn't in bed during that period immediately following the operation. There are entries under June 27 also that—on page 98 showing she was up and about.

On June 28 on page 98 that—showing that she was up and sitting on the porch.

On page 99 under date of July 1 there is an entry reading "Major Freeman visited soon after patient developed hysteria which lasted close to two hours manifested by sobbing and severely—," etc.

On July 2nd, page 100, there is an entry that "was apparently in good humor until about 0900 when she began suffering for no apparent reason. She was instructed to go to the bathroom and take a sponge bath which she did and returned to her bed seemingly happy again, but in about 15 minutes was again weeping." Under date of July 3 hysterical [155] for about 45 minutes. Very belligerent, threatened to slap and hit the nurse.

On page 101 under date of July 5 there is an entry, "Refused to have dressings changed."

Another 1:15 in the morning, July 5, morning of July 6, patient stated she is unable to sleep there up and walking about the ward. That is Thursday night.

On July 9, on page 102 there is an entry that—showing that she was coming—she was up to take a sponge bath and that she apparently felt fine. Coming back from the latrine she yelled and ap-

parently fainted. They gave her spirits of ammonia and revived her.

There are continued references to hysterical conduct and to fits of temper through here. I am not going to read all of these, your Honor. But there are numerous entries where she refused to allow the nurses to change the dressings.

On July 19 on page 106 there is the following entry: "Patient continually rubbed and pulled the incision in spite of constant warnings not to do so."

On page 107 there is the entry: "Patient continues to constantly rub and pull the incision and dressings. She has been repeatedly instructed not to do this.

On page 114—on page 109 there is an entry reading as follows:

"Has been crying and sobbing and rubbing leg since [156] 2100."

The Court: What date?

Mr. Deasy: This is July 26, your Honor.

"Becoming more hysterical every moment. Apparently having intense unbearable pain according to her description and sobbing accusations. Nembutal given patient immediately (underscored). Stopped crying apparently. Pain became unbearable, sleeping soundly within 15 minutes after taking Nembutal."

Mr. Wertheimer: I move to strike out the entry which is obviously an opinion or a conclusion. Anything that comments on the facts is—

Mr. Deasy: I am reading an entry just as it is written.

The Court: It states the fact, doesn't it? It says given a tablet to sleep.

Mr. Wertheimer: I guess you are right. Withdraw the objection.

Mr. Deasy: On page 114 under date of August 7—

Mr. Wertheimer: Just a moment, until I find that place.

Mr. Deasy: This is August 7th at 0100. That is one o'clock a.m. This entry explains "crying loudly, found tampering with dressing and wound. Moderately large amount of bloody drainage on bottom and top sheet. Dressings clean—" clear or clean, I can't read it, but it is—"aspirin given, quiet, sleeping." [157]

On page 128 under date of September 15—

Mr. Wertheimer: Just a moment, I haven't found that.

Mr. Deasy: 128. The pages are not entirely in chronological order, your Honor.

Mr. Wertheimer: I understand that. The numbering here is—

Mr. Deasy (Interrupting): This item appears under September 15: "Awake but asked for no medication. Had covers pushed down. Looks like SO trunk and part of thighs exposed. Said 'I am cold but I was so hot.' "

On page 145—pardon me, page 140—page 140 and 141—these are reversed in chronological order.

What I will read from 141 starting at paragraph 3, the following entry appears:

"Lt. Rector on ward to repack wound. Patient apparently in sound sleep. Nurse was asked what hot pack on left arm was for—replied some fluid had scraped into tissue from intravenous glucose 5 per cent NS during the night. Nurse was remarking that her arm was somewhat swelled. She has kept us running all day with hot packs and hot water bottle. Patient immediately wide awake. Began throwing anything within reach at nurse and yelling and crying she hated the nurse and wished the nurse had similar stab wound and open incision that she would like to stuff her nurse's leg full of gauze. Frequently screamed 'get her out of here.' When told by [158] Lt. Rector she must have something to do with the feud between herself and nurse, she continued sobbing and yelling that they, the nurses, were all just mean and hated to do anything for her. Patient thrashed about at beginning of dressing disarranging layout—laid out equipment creating danger of contaminating sterile set. Civilian worker reports patient in civilian latrine with door locked. Nurse knocked and called to patient until 1905—this entry is 1850 until 1905 before patient came out. Patient in latrine wailed that 'I am bleeding, I am bleeding,' with no attempt to open door until time stated. Wound dressing wasn't examined by nurse but patient immediately began to dress and had previously threatened to leave here during change of dressing. Patient

dressed, ate piecemeal in ward kitchen. Refuses supper tray. Left ward, SOD notified, patient said 'I am going to Auburn.' " That entry is under 1925, the time, and under time of 2010 "Patient returned to ward apparently having spent half-hour at the PX. Patient was seen at PX by day nurse very depressed sitting on chair in room when back on ward."

Mr. Wertheimer: If the Court please, with respect to that entry. I will move it be stricken as being incompetent and immaterial. A civilian worker reporting the patient in the civilian latrine with door locked and crying is hearsay. I think the only thing that is admissible in the [159] hospital records is the reports of the fact.

The Court: Well, of course hospital records themselves are a violation of the hearsay rule. There is no doubt about that, but they are allowed as a violation of the hearsay rule. If there is something that is subject to an ordinary notation in the record of the hospital as to the conduct of the affairs of the hospital and the patient in there. The things that are excluded are opinions as to conditions and diagnoses and things where there is more harm to be done by admitting such opinions because there is no opportunity to cross-examine. But such a factual matter as whether or not a person went to the lavatory or not, or whether someone saw her going to the lavatory or not, while they are hearsay are admissible if they are a part of the hospital records.

Mr. Wertheimer: I think, your Honor, that the rule is—

The Court (Interrupting): Well, I am not going to waste time arguing about such a trivial matter as this. Overruled. It isn't of any importance that I can see in the case anyhow.

Mr. Deasy: Under date of September 1945 on page 140, this entry appears:

"Rector visited—Lt. Rector visited patient, asked to have room door shut continuously, as have two to four days; although told by Lt. Rector to stay in bed goes to [160] latrine and spends ten minutes to half an hour one time or three times per a.m. and p.m."

Now, on page 145 this is under date of August 25, this following occurs: "As patient's temperature was 99.0 nurse gave another thermometer and came back shortly. Thermometer read 104.4. Patient upset at having rectal reading, thrashed about until knocked radio off. Rectal reading 98.8."

Now, under date of August 21 on page 146 there are entries showing that she was walking in the halls and sitting outside the ward premises.

On October 21—this is on page 59, Counsel, it goes back. On the date of October 21, this is—this entry appears:

"Small amount of dry red blood at upper outer corner of wound. Vaseline gauze appeared to be tampered with."

On page 61 on October 26—

Mr. Wertheimer: (Interrupting) I would, your

Honor, I would again move that the part "appeared to be tampered with" be stricken as a conclusion and opinion.

Mr. Deasy: It is a notation of what she observed.

Mr. Wertheimer: Every notation is admissible under the business entry rule. The rule states according to the Code, the California Code of Civil Procedure, the report of a fact, condition or event.

Now, it is true records themselves are hearsay, but if that interne excluded other hearsay or opinions or the like or if that report, for instance—suppose in the record it appeared that John Doe said that John Roe said that—

The Court: (Interrupting) We are not concerned with theoretical cases. It is an actual situation that confronts us with respect to the state of this record. I will overrule the objection. The objection here goes more to the weight rather than to the admissibility of this testimony. I will let it in because there is other evidence, other statements in the record of previous similar things so that particular entry, the objection is more to its weight than its admissibility.

Mr. Deasy: On page 61, under October 26, there is the entry:

"Patient states she is going to remove tubes and get out of bed. Very uncooperative. Out on the porch." That was on page 61, Counsel.

Page 62, under October 27, at the bottom of the page appears the entry:

"Patient quite uncooperative, emotional, threatens to get out of bed."

On page 63, under date of October 29, this entry appears:

"Large amount of bright red blood oozing from wound. Good night dressing appeared to be tampered with. Small [171] portion of wound exposed."

Mr. Wertheimer: Same objection, your Honor.

The Court: Same ruling.

Mr. Deasy: On page 64 under date of October 30 this entry appears:

"Patient refused to let nurse see dressing. Patient appeared quite nervous, profuse diaphoresis. Bed clothes and cradle were on sideways. Patient became excited, struck nurse on chest and arms with insistence of nurse upon seeing dressing, patient then stated she was up out of bed and had walked to latrine. Ramp supervisor notified to see patient. Dressing placed over wound and reinforced. A moderate amount of bright red blood. It indicates—became hysterical, was forced to stay in bed."

On page 76 the following entry appears under November 15:

"Patient became hysterical. Began getting out of bed. When put back in bed patient struck WAC on chest and arms. Patient became worse—patient's leg became worse and twisted in cradle. SOD notified and her dressing reinforced by Captain Zeigler and Colonel Pendegrast notified. Here patient began to be calmer now but still has wild psychotic glare."

Next page 77, which is under date of November 16, the entry appears:

"Patient out of bed crying, insisted upon leaving hospital at once. Locked door. Patient returned to bed at 1800."

The Court: Is that all you wish to call attention to at this time?

Mr. Deasy: Yes, your Honor.

The Court: We will take a brief recess then.

(Short recess.)

(After recess.)

Mr. Wertheimer: I have, your Honor, two entries to read from this hospital record and then I am through with my part of the case, your Honor. Reading No. 43, Mr. Deasy, it is called Pathological examination of tissue.

Mr. Deasy: Yes.

Mr. Wertheimer: This pathological examination of tissue is signed by a gentleman by the name of Madoff who is Chief of the Laboratory Service. It is dated August 23, 1945.

"Saphenous vein ligation. Clinical history —" first it says, "Saphenous vein ligation 12 June 1945. Wound in fold of groin broke down and has failed to granulate or heal. Has a continuous bloody discharge."

Then there is the pathological report. I won't read that part that is described as gross which describes apparently [173] a specimen in part. Then the microscopic shows some granulation tissue which

is predominant hemorrhagic. There are a number of areas within the tissue that show focal degeneration and a subacute and inflammatory reaction. A number of the blood vessels show swelling and fibrinoid degeneration of the walls and occasional small multi-nucleated giant cells are seen. Diagnosis granulation tissue, hemorrhagic.

Then the second and the only other one I want to read is the pathological examination of tissue dated October 3, 1945, also signed by Irving Madoff, Lt. Col. I may have demoted him to the grade of Lt. a moment ago. He is a Lieutenant Colonel and Chief of the Laboratory service.

"Microscopic: Section consists of skin subcutaneous tissue, and underlying fat. The microscopic picture is essentially similar to that seen in previous excisions. There is a moderately severe, chronic inflammatory reaction in the subcutaneous tissue and fat. In the adipose tissue there are scattered small focal areas of necrosis and hemorrhage, as well as a few larger hemorrhagic areas. There is a considerable capillary dilatation and congestion throughout the tissue. The diagnosis is peniculitis, hemorrhagic, chronic."

Mr. Wertheimer: That is the Plaintiff's case, your Honor. [174]

Do you want to argue on the motion?

Mr. Deasy: At this time, your Honor, I would like to move for a dismissal of the action upon the ground that the evidence does not show—first that the operation and subsequent treatment referred to

in the evidence and in the complaint were performed or given by any employees of the United States while acting in the line of duty or within the course and scope of his employment; secondly upon the ground that the evidence does not—fails to show any act or omission either negligent or wrongful on the part of any employee of the United States acting in the scope of his employment or in the line of duty.

(Thereafter motion argued by Counsel for both sides.)

The Court: The order will be then that the motion will be taken under advisement and the trial will be continued until—I will continue the trial until April the 8th.

Mr. Wertheimer: That is satisfactory, your Honor. Thank you. [175]

State of California,
City and County of San Francisco—ss.

I, B. E. O'Hara, Official Reporter Pro-tem, of the District Court of the United States for the Northern District of California, Southern Division, do hereby certify that the foregoing pages 1 to 175, inclusive, contain a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on the trial in said Court of the action entitled Myrtle Canon, Plaintiff, versus The United States, Defendant, and numbered 27473-G in the files of said Court; and that said

transcript includes the testimony offered or taken, evidence offered or received, and all rulings, acts, instructions or statements of the Court, also all objections or exceptions of Counsel, and all matters to which the same relate.

In Witness Whereof, I have hereunto set my hand this 3rd day of December, 1949.

/s/ B. E. O'HARA,
Reporter.

[Endorsed]: Filed December 7, 1949. [176]

[Endorsed]: No. 12394. United States Court of Appeals for the Ninth Circuit. Myrtle Canon, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 4, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12394

MYRTLE CANON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL AND DESIGNATION OF PARTS
OF THE RECORD NECESSARY FOR CON-
SIDERATION THEREOF

To the Honorable William Denman and to the Honorable Associate Justices of the United States Court of Appeals for the Ninth Circuit:
Appellant respectfully states that the following are the points upon which appellant intends to rely on appeal, to wit:

1. The District Court erred in granting a judgment of dismissal of plaintiff's action;
2. The judgment of dismissal is against law;
3. The judgment of dismissal is against evidence;
4. Colonel William Smith, Commanding Officer of DeWitt General Hospital, at Auburn, California, was acting in the scope of his office or employment and in line of duty in admitting plaintiff to the

DeWitt General Hospital as a patient, and in authorizing an operation for varicose veins to be performed upon her in that hospital and in authorizing the use of the facilities of said hospital for such operation and for post-operative treatment of plaintiff;

5. Dr. E. William Rector was empowered and was acting in the scope of his office or employment and in line of duty in performing an operation upon plaintiff on June 14, 1945 and in providing plaintiff with post-operative surgical and medical care or treatment at DeWitt General Hospital;

6. Dr. Norman Freeman was empowered, and was acting in the scope of his office or employment and in line of duty in providing plaintiff with surgical or medical care or treatment at DeWitt General Hospital;

7. The nurses, doctors, attendants, or other employees of the United States, employed or attached to DeWitt General Hospital during the time plaintiff was a patient at said hospital, were empowered to, and were acting in the scope of their offices or employment and in line of duty in providing plaintiff with surgical, medical, hospital, nursing or other care, treatment or services in DeWitt General Hospital;

8. Under the law of the State of California, the United States of America, if a private person, would be liable to plaintiff for damages on account

of the actions of its agents, servants and employees in this case.

Appellant designates the following documents and parts of the record, which appellant thinks necessary for the consideration of the foregoing points on appeal, to wit:

1. All of the Clerk's transcript of record;
2. Only the following portions of the Reporter's Transcript:
 - A. Page 2, line 1, to and including page 26, line 20;
 - B. Page 78, line 21, to and including page 80, line 6;
 - C. Page 86, line 22, to and including page 87, line 3.

Dated: December 13, 1949.

Respectfully submitted,
HALLINAN, MacINNIS
ZAMLOCH,
RALPH WERTHEIMER,
/s/ RALPH WERTHEIMER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

[Title of Court of Appeals and Cause.]

RESPONDENT'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD NECESSARY FOR CONSIDERATION OF APPEAL

To the Honorable William Denman and to the Honorable Associate Justices of the United States Court of Appeals for the Ninth Circuit:

Respondent respectfully designates the following additional documents and additional parts of the record which respondent believes necessary for the consideration of this appeal, to-wit:

1. Any and all portions of the Reporter's Transcript not heretofore designated by Appellant.
2. Any and all exhibits filed in the trial court by either Appellant-plaintiff or Respondent-defendant which have been designated in Appellant's designation of the record on appeal filed in the District Court or have been designated in Respondent's supplemental designation of the record on appeal filed in the District Court.
3. Any and all portions of the record on appeal designated by appellant in his "Designation of Contents of Record on Appeal" filed November 3, 1949, in the District Court, which appellant may have omitted from his "Statement of Points upon which Appellant Intends to Rely on Appeal and Designation of Parts of the Record Necessary for Con-

sideration thereof," dated December 13, 1949, and filed with the Court of Appeals.

Dated: December 23, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ CHARLES O'GARA,
Asst. U. S. Attorney,

Attorneys for Respondent.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 23, 1949.

[Title of Court of Appeals and Cause.]

ORDER THAT PORTIONS OF RECORD
NEED NOT BE PRINTED

Good cause appearing therefor,

It Is Hereby Ordered that all of the exhibits filed in the trial Court in this cause and heretofore transmitted to the Court of Appeals for the Ninth Circuit need not be printed as part of the Record on Appeal but may be considered in their original form and in such original form shall constitute a part of the Record on Appeal; provided further, that excerpts from said exhibits may be printed as appendices to either Appellant's or Appellee's briefs herein.

Dated: This 16th day of January, 1950.

/s/ WILLIAM DENMAN,

Judge of the United States Court of Appeals for
the Ninth Circuit.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

Judges, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed Jan. 16, 1950.

[Title of Court of Appeals and Cause.]

REQUEST FOR ORDER RE EXHIBITS

City and County of San Francisco,
State of California—ss.

Charles O'Gara, Assistant United States Attorney,
being first duly sworn, deposes and says:

That he is the Assistant United States Attorney
with Frank J. Hennessy, United States Attorney,
representing the United States of America, Appellee
in Myrtle Canon, Appellant v. United States,
Appellee, appeal, case No. 12394, in the United
States Court of Appeals for the Ninth Circuit;

That he has examined all the exhibits on file in
this appeal with said Court of Appeals and finds
them to consist principally of United States Army
Hospital records, so voluminous that printing them
as part of the Record on Appeal would involve
great expense and loss of time to the Appellee, and
he therefore recommends and requests that said
Court of Appeals order that said exhibits may be
considered in their original form as part of said
record on appeal.

/s/ CHARLES O'GARA,
Asst. U. S. Attorney.

Subscribed and sworn to before me this 13th day
of January, 1950.

/s/ PAUL P. O'BRIEN,
Clerk, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed January 16, 1950.